TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 57.

JOVITE CAO, PLAINTIFF IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED MAY 9, 1900.

(13,644.)

(18,544.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 22, 1903.

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a UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1901, and held in the court room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

JOVITE CAU, Plaintiff in Error,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 1081.

Be it remembered that heretofore towit, on the 13th day of July, 1901, a transcript of the record from the circuit court of the United States for the eastern district of Louisiana was filed in the office of the clerk of said circuit court of appeals for the fifth circuit, in the words and figures following to-wit:

1 UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

JOVITE CAU, Plaintiff in Error,
versus
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 12923.

Branch K. Miller, Esquire, for plaintiff in error;
Howe, Spencer & Cocke, Esquires; and,
F. N. Finlay, Esquire, for defendant in error.

Writ of error to the circuit court of the United States for the eastern district of Louisiana (New Orleans division) from the United States circuit court of appeals for the fifth circuit, returnable within thirty (30) days from the fifteenth (15th) day of June, A. D. 1901, at the city of New Orleans, State of Louisiana.

Proceedings in the Civil District (Court) for the Parish of Orleans.

Transcript filed Jan. 23, 1901.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Civil District Court for the Parish of Orleans.

Civil District Court, Parish of Orleans, Division "C"—Honorable John St. Paul, Judge.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 63533.

Transcript of removal from the civil district court for the parish of Orleans into the circuit court of the United States for the fifth circuit and eastern district of Louisiana.

Petition.

Filed Nov. 15th, 1900.

Civil District Court, Parish of Orleans, Div. "C"—Hon. John St. Paul, Judge.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 63533.

To the honorable the judges of the civil district court for the parish of Orleans:

The petition of Jovite Cau a citizen of the Republic of France, respectively (respectfully) shows:

That the Texas & Pacific Railway Company, a corporation created by the Congress of the United States, and having an agent with the power and authority to receive citation and stand in judgment for it in this city, is justly and truly indebted to your petitioner in the sum of five thousand seven hundred and fifty-four dollars and ninety-three cents ($5754.93), with legal interest from judicial demand for this, to-wit:

3 That on September 15th, 1900, your petitioner delivered to said railway company, at Texarkana, Texas, for carriage from that place to the city of New Orleans, sixty-four bales of cotton, five bales marked F. A. N C Y, fifteen bales marked M A R Y, three bales marked L O L A, eighteen bales marked A R T S, nine

bales marked C H O F, six bales marked C A G A, and eight bales marked X T R A, and on September 17th, 1900, forty-six bales of cotton, nine bales marked X T R A, five bales marked M A R Y, eleven bales marked A R T S, five bales marked L O L A, nine bales marked WARE, one bale marked C A G E, four bales marked D A M E, and two bales marked F N C Y, at an agreed charge for freight, for sixty cents per hundred pounds, and in evidence of said contract the said company did then and there delivered (deliver) its bills of lading.

That petitioner was the true and lawful owner of said one hundred and ten bales of cotton described in said bills of lading.

That while the said one hundred and ten bales of cotton were awaiting further shipment, but after they had been received by said railway company as a common carrier, and was in their possession as such, and after it had issued its bills of lading to carry the same, the whole of said cotton was destroyed by fire.

That by the third clause of said bills of lading, the said railway company attempted to limit its liability, as a common carrier, — its declaration that it should not be liable for any damages to, or destruction of, said cotton, caused by fire; that said clause is wholly inoperative, null and void, against petitioner on the following grounds, to-wit:

That petitioner did not receive any consideration from the said railway company, for such limitation of its common law liability, and hence is not bound by the same.

That the said clause is otherwise not binding upon, and is inoperative against petitioner, and without effect on the further grounds that the destruction of said cotton by fire as aforesaid was due to, and caused by the negligence of the said company, its agents and servants, and on the further ground also that the said cotton was received by said railroad company prior to its issuance of said bills of lading, and it was without authority after the receipt of said cotton as a carrier, to limit its liability under the common law.

That the value of said cotton is the amount aforesaid, namely, five thousand seven hundred and fifty-four dollars and ninety-three cents ($5754.93).

4 Petitioner avers amicable demand without avail.

Wherefore petitioner prays that said Texas & Pacific Railway Company be duly cited to answer this petition, and after due proceedings, he have and recover judgment against it for the said sum of five thousand seven hundred and fifty-four dollars and ninety-three cents ($5754.93), with legal interest from judicial demand, and for costs and general relief.

(Signed) BRANCH K. MILLER,
Attorney for Petitioner.

Copy of Citation with Sheriff's Return Thereon.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY CO. } No. 63533.

To the Texas & Pacific Railway Company, through its proper officer, New Orleans, La.:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the civil district court for the parish of Orleans, within ten days from the service thereof.

Witness the Honorables W. B. Sommerville, T. C. W. Ellis, Fred. D. King, Geo. H. Theard, John St. Paul, judges of the said court, this 15th day of November, in the year of our Lord 1900.

(Signed) A. M. BURKE,
Deputy Clerk.

Courthouse—opposite Jackson square.

(Indorsed:) No. 63533. Civil district court for the parish of Orleans. Jovite Cau *vs.* Texas & Pacific Railway Company. Branch K. Miller, attorney. Copy of petition and citation inside to be served on the Texas & Pacific Railway Company through its proper officer, New Orleans. Received Thursday, Nov. 15th, 1900, and on the 16th day of November, 1900, I served a copy of the within citation and accompanying petition on The Texas & Pacific Railway Company, defendant herein, by personal service on Robert Strong, their general agent. Returned same day. (Signed) R. H. Lytle, d'y sheriff. Sheriff's fee, $1.50. No. 63533. Civil district court, parish of Orleans. Filed November 19th, 1900. (Signed) A. M. Burke, d'y clerk.

Petition, Affidavits, Bond, and Order for Removal.

Filed November 23rd, 1900.

Civil District Court, Parish of Orleans, Division "E."

JOVITE CAU
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 63533.

To the honorable the judges of the civil district court in and for the parish of Orleans:

The petition of The Texas & Pacific Railway Company, defendant in the above entitled and numbered cause, with respect represents:

That your petitioner, The Texas & Pacific Railway Company, was, prior to the beginning of this suit, and now is, a corporation created by and organized under and by virtue of certain acts of Congress of the United States, to-wit:

First. "An act to incorporate the Texas & Pacific railway and to aid in the construction of its road and for other purposes." Approved March 3, 1871, being chapter 122 of the Public Laws of the United States of 1871.

Second. An act supplemental to the foregoing act, approved May 2, 1872, being chapter 132 of the Public Laws of the United States of 1872.

Third. An act supplemental to the act of 1871, approved March, 1873, being chapter 257 of the Public Laws of the United States of the year 1873.

Fourth. An act supplemental to said act of 1871, approved June 22, 1874, being chapter 476 of the Public Laws of the United States of the year 1874.

That the Southern Pacific Railway Company of Texas, created by acts of the legislature of that State of February 16, 1856, and the Southern Transcontinental Railway Company of Texas, created by acts of the legislature of said State of July 27, 1870—were prior to the said 22nd day of June, 1874, merged in and consolidated with said The Texas & Pacific Railway Company, and your petitioner, the said The Texas & Pacific Railway Company, acquired and now owns all the property, rights, powers, privileges and franchises of the said Southern Pacific Railway Company and Southern Transcontinental Railway Company, and such acquisitions and merger were recognized, affirmed and approved by said act of Congress of June 22, 1874.

6

That, under the powers thus conferred and confirmed by said acts of Congress of the United States, your petitioner has acquired, completed, possessed, and operated its railway from El Paso, in the State of Texas, to New Orleans, Louisiana, and has been thus operating the same upwards of fifteen years last past; being the same line of railway concerning which allegations are made by the plaintiff in

the petition in this cause, and the said railway is operated and used as a medium of interstate commerce and for the transportation of the United States mail. That your petitioner has, on the 16th day of November, 1900, been served with process and cited to appear before this honorable court in this cause, and this petition for removal is made and filed before petitioner and defendant in this cause, is required by the laws of this State and the rules of this court, to answer and plead to the petition, declaration or complaint of the plaintiff, and the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum and value of two thousand dollars.

That the said suit arises under the Constitution and laws of the United States, and that the controversy between the plaintiff and the defendant herein arises under and is to be determined by the laws of the United States, and especially under the acts of Congress above cited, the rights, immunities, and exemptions conferred by which, this petitioner, defendant in this cause, specially claims herein.

That your petitioner, the said The Texas & Pacific Railway Company, is desirous of removing this cause to the circuit court of the United States for the fifth circuit and eastern district of Louisiana, and your petitioner offers and files herewith bond with good and sufficient surety, according to law, for its entering in said circuit court of the United States on the first day of its then next session, a copy of the record in this suit, and for paying all costs that may be awarded by said court if said court shall hold that this suit was wrongfully or improperly removed thereto, and for appearing and entering special bail there (therein) if the same be required, and otherwise conditioned according to law.

Wherefore, petitioner prays that this honorable court *to* (do) proceed no further herein, except to make the orders of removal
7 required by law, and to accept this petition and the said bond and surety, and to cause the record herein to be removed into said circuit court of the United States in and for the fifth circuit and eastern district of Louisiana, and for all necessary orders and for general relief.

(Signed) HOWE, SPENCER & COCKE,
Att'ys for the Texas & Pacific R'y Company.

"*Affidavit.*"

STATE OF LOUISIANA, } *ss:*
Parish of Orleans, }

Robert Strong, being duly sworn, deposes and says, — the general agent of the Texas & Pacific Railway Company in the State of Louisiana, and authorized for and on behalf of said railway company to make the foregoing application for removal and this affidavit, and to sign the bond for removal which is tendered herewith, and that the foregoing petition is true.

(Signed) ROB'T STRONG.

Sworn to and subscribed before me this 23rd day of November, 1900.

[SEAL.] (Signed) J. G. EUSTIS, *Not. Pub.*

"*Bond.*"

Know all men by these presents, that we, The Texas & Pacific Railway Company, as principal, and Pearl Wight, of the parish of Orleans, State of Louisiana, and eastern district of Louisiana, as surety, are held and firmly bound unto Jovite Cau and all other persons *to* whom it may concern, in the penal sum of five hundred dollars ($500.00) for the payment of which we bind ourselves jointly and severally by these presents.

This dated and signed at New Orleans this 23 day of November, 1900.

The condition of the above obligation is such that whereas the said The Texas & Pacific Railway Company, has filed its petition and applied to the civil district court in and for the parish of Orleans and State of Louisiana, to remove a certain cause pending in said court wherein Jovite Cau is plaintiff and the said The Texas & Pacific Railway Company is defendant (the said cause being No. 63533 of the docket of said court), from the said civil district
8 court of the parish of Orleans to the circuit court of the United States for the fifth circuit and eastern district of Louisiana.

Now, therefore, if the said Texas & Pacific Railway Company shall enter in said circuit court of the United States for the fifth circuit and eastern district of Louisiana, on the first day of the next term thereof, a copy of the record of said suit, and shall pay all costs that may accrue or be awarded by said circuit court if it shall be held that said suit was wrongfully or improperly removed thereto; and shall also appear and enter special bail in said circuit court in said suit if special bail was originally required therein, then this obligation to be void; otherwise to remain in full force and effect.

THE TEXAS & PACIFIC RAILWAY COMPANY,

(Signed) By ROBERT STRONG, *General Agent.*

(Signed) PEARL WIGHT, *Surety.*

"*Affidavit.*"

STATE OF LOUISIANA, *Parish of Orleans,* } ss:

Pearl Wight, the surety named in the foregoing bond, being duly sworn, deposes and says: That I am a resident of the State of Louisiana, parish of Orleans, and city of New Orleans *and city of New Orleans* and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property exempt by law from execution; and that I have property in the parish of Orleans and State of Louisiana and

in the eastern district of Louisiana liable to execution for the value of five hundred dollars and more.

(Signed) PEARL WIGHT.

Sworn to and subscribed before me this 23rd day of November, 1900.

[SEAL.] (Signed) J. G. EUSTIS, *Not. Pub.*

"*Order.*"

On consideration of the foregoing petition and bond, it is ordered that the said petition and bond be, and the same are hereby accepted, and that this court proceed no further in said suit; and that the same be removed to the circuit court of the United States for
9 the fifth circuit and eastern district of Louisiana, as prayed for in said petition, and according to the statutes in such case made and provided.

New Orleans, Nov. 23rd, 1900.

(Signed) JOHN ST. PAUL, *Judge.*

Certificate.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, William B. Murphy, deputy clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing nine pages do contain a true, correct and complete transcript of all the proceedings had in the cause wherein Jovite Cau is plaintiff and Texas & Pacific Railway Company is defendant, instituted in this court and now in the records thereof under the No. 63533 of the docket thereof, division "C," the Honorable John St. Paul, judge.

In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this twenty-third day of January in the year of our Lord one thousand nine (hundred) and one (1901), and in the one hundred and twenty-fifth year of the Independence of the U. S. of America.

(Signed) W. B. MURPHY,
Deputy Clerk.

10 PROCEEDINGS IN THE U. S. CIRCUIT COURT.

Answer.

Filed February 11, 1901.

United States Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

And now comes the defendant, and reserving unto itself the right to further amend this answer, denies all and singular the allegations in said petition contained.

Wherefore, the premises considered, defendant prays that the plaintiff's suit be dismissed at his costs.

(Signed) HOWE, SPENCER & COCKE,
Att'ys for Defendant.

February 21, 1901.—Motion to set down cause on the trial docket and cause fixed for March 11, 1901.

Monday, March 11, 1901.—On motion of counsel for the respective parties, cause re-assigned for March 21st, 1901.

Thursday, March 21st, 1901.—Cause not being reached owing to pressure of other business, re-assigned for April 1st, 1901.

Monday, April 1st, 1901.—On motion of attorney for plaintiff, cause continued to April 11, 1901, at 11 a. m.

Thursday, April 11, 1901.—On motion of counsel, cause continued to be re-assigned.

Supplemental and Amended Answer.

Filed May 8th, 1901.

JOVITE CAU
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

11 The supplemental and amended answer of the Texas & Pacific Railway Company to the petition of the plaintiff herein, says:

1. It reiterates all and singular the allegations in its original petition contained.

2. Further answering, defendant says that such of said cotton, the value of which is sued for in this cause, as came into the defendant's possession for transportation between the points alleged, was received by it to be transported under bills of lading evidencing written contracts between the plaintiff, or persons from whom he subsequently

acquired said cotton, and this defendant, setting forth the terms, stipulations, and conditions under which this defendant as a carrier undertook the transportation of said cotton which said bills of lading are in the possession of the plaintiff herein, and the defendant begs leave to refer to, annex and make said bills of lading part of its answer as fully as if set forth at length herein.

3. Defendant admits that such of said cotton — was received by it for transportation under the terms and conditions of said bills of lading as aforesaid, was destroyed by fire at the place and time as alleged in the plaintiff's petition.

4. Defendant avers that the bills of lading aforesaid evidencing contracts between the parties and expressing the terms and conditions upon which said cotton was to be transported by this defendant, contained the express stipulation, among others, that this defendant should not be liable for the loss of, or damage to, said cotton by fire, and defendant expressly claims and pleads the benefit of this exception, as well as of all the other stipulations and conditions in said bill of lading contained.

5. Further answering, defendant avers that the plaintiff herein has no real or substantial interest in the subject matter of this suit, for inasmuch as prior to the institution of this suit, said plaintiff had parted with all his right, title, and interest in and to any claim or demand that for any reason he might have had against this defendant, growing out of the loss or damage to said cotton to certain insurance company or companies, the names of which are now unknown to your defendant, but which will be proven upon the trial of this case, and that if the plaintiff herein had any right or cause of action at any time against this defendant, which is denied, that said cause of action no longer belonged to or was vested in said plaintiff at the institution of this suit.

Wherefore, the premises considered, defendant prays that this suit be dismissed at the plaintiff's costs, and for general relief.

(Signed) HOWE, SPENCER & COCKE,
Attorneys for Defendant.

12 Let this amended and supplemental answer be filed.
New Orleans, La., May 8th, 1901.

(Signed) CHARLES PARLANGE, *Judge.*

May 10, 1901.—Order fixing case for May 17, 1901.
May 17, 1901.—Case called, trial and continuance.

Extract from the Minutes, April Term, 1901.

NEW ORLEANS, FRIDAY, *May 17th*, 1901.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY CO. } No. 12923.

This case was called for trial.
Present: Branch K. Miller, attorney for plaintiff; Howe, Spencer & Cocke and Finley, attorneys for the defendant.
Whereupon the following named jurors were called and sworn to well and truly try the issue joined herein, to-wit:

1. T. A. Faries.
2. J. S. Barnes.
3. Jno. B. Steiner.
4. J. P. Buckley.
5. Charles F. Frink.
6. James A. Douglas.
7. Wm. Gorman.
8. James W. Gaines.
9. Louis J. Reily.
10. P. W. Parr.
11. W. H. Kelly.
12. C. E. Staub.

When the court appointed T. A. Faries foreman of the jury and the trial proceeded with. After hearing pleadings, evidence, testimony and counsel, it was ordered that the cause be continued to Monday, May 20, 1901, at 11 a. m.

Hearing and Verdict.

Extract from the Minutes, April Term, 1901.

NEW ORLEANS, MONDAY, *May 20th*, 1901.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

13 JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY CO. } No. 12923.

This cause as continued from last Friday, was this day resumed, counsel for all parties being present; whereupon it appearing that only 11 jurors were present and that one James A. Douglas was absent, it was ordered by consent of counsel in open court that said juror James A. Douglas be excused and that the case proceed with the jurors here present.
After hearing the charge of the court, the said jury did then and there in open court, under instructions of the court, render and deliver the following verdict, to wit:

We the jury find a verdict in favor of the defendant.
May 20, 1901.

T. A. FARIES, *Foreman.*

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

Rule for New Trial.

Filed May 24th, 1901.

U. S. Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

On motion of Branch K. Miller, attorney for plaintiff:

It is ordered that defendant show cause, on Saturday, June 1st, 1901, at 11 o'clock a. m., why a new trial should not be granted herein on the following grounds, to wit:

1st. That the court erred in refusing to give to the jury the five special instructions requested by plaintiff.

2nd. That the court erred in directing the jury to find a verdict for defendant.

3rd. That the court erred in holding that there was any consideration to support the stipulation contained in the bill of lading by which defendant was exempted from any liability for the loss of or damage to plaintiff's cotton by fire.

4th. That the court erred in holding that there was any freedom of choice or option allowed plaintiff by defendant as to the
14 rate at which they would carry his cotton or as to whether or not he could ship his cotton under a contract with the defendant importing its liability as a carrier at common law, or under a contract by which it was exempted from liability for loss or damage by fire or otherwise.

5th. That the court erred in holding that the defendant had, or its agent at Texarkana, Texas, could have allowed or given any other rate for the transportation of the cotton concerned in this suit, than the rate of which it informed plaintiff's agent, and at which the said cotton was shipped.

6th. That the charge or direction of the court to the jury was contrary to the law and the evidence.

Marshal's Return on Rule.

Received by the U. S. marshal, New Orleans, La., May 24, 1901, and on the 24th day of May, 1901, I served copy hereof on Howe,

Spencer & Cocke by handing the same to W. B. Spencer, of the firm of Howe, Spencer & Cocke in the city of New Orleans, La.

(Signed) CHAS. FONTELIEU,
U. S. Marshal,
By J. H. PATIN,
D'y U. S. Marshal.

June 1.—Rule for new trial continued to Monday, June 3rd.

Order Allowing 15 *Days' Time to Present Bills of Exceptions.*

Extract from the Minutes, April Term, 1901.

NEW ORLEANS, MONDAY, *June* 3*rd*, 1901.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY CO.

15 On motion of Branch K. Miller, attorney for plaintiff, it is ordered that plaintiff be allowed a delay of fifteen days (15) from the date the new trial may be refused within which to complete and file the bills of exceptions herein taken by him.

Rule for new trial continued to June 6th, 1901.

Order Refusing New Trial.

Extract from the Minutes, April Term, 1901.

NEW ORLEANS, MONDAY, *June* 10*th*, 1901.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

This cause came on to be heard at a former day upon the rule for a new trial herein filed by the plaintiff, and after arguments from counsel was submitted.

Whereupon, and on consideration thereof and for the reasons on file, it is ordered that a new trial herein be and the same is hereby refused.

Judgment.

Extract from the Judgment Book, April Term, 1901.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

NEW ORLEANS, MONDAY, *May 20th*, 1901.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

By reason of the verdict of the jury herein and in accord-
16 ance therewith: it is ordered, adjudged and decreed that there be judgment in favor of the defendant, The Texas & Pacific Railway Company, dismissing this suit with costs.
Judgment rendered May 20th, 1901.
Judgment signed June 11th, 1901.
(Signed) CHARLES PARLANGE, *Judge.*

Bill of Exceptions No. 1.

Filed June 15th, 1901.

United States Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

Bill of exceptions No. 1.

This was an action at law to recover the value of certain cotton, the property of plaintiff, destroyed by fire while in the possession of defendant as common carrier, said possession being had by said defendant under and by virtue of *a* certain bills of lading, issued and delivered by defendant to the plaintiff, showing its receipt of said cotton, and its contract as a common carrier, to carry the said cotton from Texarkana, State of Texas, a point of the line of railway of defendant, to the city of New Orleans, State of Louisiana, and there deliver the said cotton to plaintiff.

This case came regularly on for trial on the 17th day of May, 1901, before the Honorable Charles Parlange, district judge, sitting in the circuit court; Branch K. Miller, Esq., appearing as counsel for the plaintiff, and Walker B. Spencer, Esq., appearing as counsel for the defendant.

A jury having been empaneled, the following proceedings were had, and testimony taken.

Plaintiff, to support and maintain the issues on his part and to prove the facts set out in his petition herein as constituting his cause of action, offered, introduced and filed in evidence before the jury the four bills of lading, issued and delivered by defendant to plaintiff for the cotton described in plaintiff's petition, as set forth in said petition, with the reservation of his, plaintiff's, right to con-
17 test the effect and binding force as concerned him, plaintiff, of the clause contained in said bills of lading, undertaking to exempt the defendant from any liability for loss or damage to said cotton by fire, the said bills of lading being hereto attached and made part of this bill of exceptions, the same as though they were fully set out and incorporated at length herein.

Thereupon plaintiff, to further support and maintain the issues upon his part, and to prove the facts constituting the cause of action set out in his petition, produced and examined, before the jury, as a witness, V. W. Pons, whose testimony and evidence is shown in detail and at length by the stenographic report or transcript of the testimony heard and evidence submitted to and before the jury on the trial of this cause; which said stenographic report or transcript is hereto annexed and made part of this bill of exceptions, to be taken, considered and construed the same as though fully set out and incorporated at length herein.

Thereupon, plaintiff, in the course of the giving of the said testimony of the said Pons to the said jury, and incidental to the same, offered, introduced and filed in evidence before the jury a printed circular or tariff sheet showing the rates of transportation of freight from Texarkana, Texas, to New Orleans, Louisiana, by certain railroad companies, defendant being one of the same; which said printed circular or tariff sheet is made part of this bill of exceptions, and is hereto annexed and made part of this bill of exceptions, and is to be taken, considered and construed the same as though fully set out at length and incorporated herein.

That thereupon, the plaintiff, to further support and maintain the issues and contentions on his part, and to prove and establish the facts constituting the cause of action set out in his petition, offered and introduced in evidence, before the jury, the depositions of G. M. West and F. W. Offenhauser, taken under commission herein at Texarkana, Texas, which said depositions are hereto annexed and made part of this bill of exceptions and are to be taken, considered and construed as if fully set out and incorporated at length herein.

That thereupon the defendant, to support and maintain the issues and contentions upon its part, and to prove and establish the defense set up in its answer, produced, before the jury, D. E. Grove, who was then and there examined as a witness; his testimony thus given to the jury appeared in the said stenographic report or transcript of the testimony heard and evidence taken on the trial of this cause, which, as aforesaid, is made part of this bill of exceptions.

18 Thereupon, defendant, to further maintain and support the issues and contentions on its part, and to prove and establish the facts constituting its defense, offered and introduced, before the jury, a certain printed form of contract of insurance; which said printed form is hereto annexed and made part of this bill of exceptions, the same as though fully incorporated at length herein.

This concluded the testimony and evidence taken, offered, introduced and heard on the trial of this cause; and the foregoing testimony and evidence constituted all of the testimony and evidence which was heard or introduced upon the trial of the case; no other testimony or evidence having been offered or heard in behalf of either party to the suit besides that mentioned and described.

Whereupon, after the close of all the evidence on both sides, defendant, through its counsel, then and there in open court, requested the court to instruct or direct the jury, upon the whole of the testimony and evidence heard and offered to the jury upon the trial of this cause to find a verdict for defendant; which said request was then and there granted by the court; to which said granting of said request and ruling of the court, counsel for plaintiff then and there duly excepted, which said exception was then and there allowed in open court.

And now, in furtherance of justice and that right may be done, the court allows the said exceptions and this bill of exceptions, and signs and certifies the same.

Done in open court, this 15th day of June, 1901, *nunc pro tunc* as of May 20th, 1901, and I certify that this bill was duly presented to me within the time previously allowed by the court for presenting bills of exception in this cause.

(Signed) CHARLES PARLANGE, *U. S. Judge.*

I. C. C. No. 894. (Cancels I. C. C. No. 710.)

Port Arthur Route.

The Kansas City Southern Railway Co.

Texarkana & Fort Smith Railway Co.

In connection with

Chicago & Alton R. R.
Gulf & Interstate R'y of Texas.
Hannibal & St. Joseph R. R.
Kansas City & Northern Connecting R. R.
Missouri, Kansas & Texas R'y.
Omaha, Kansas City & Eastern R. R.
19 St. Louis, Keokuk & Northwestern R. R.
Southern Pacific Co. (Atlantic system).
St. Louis & San Francisco R. R. Co.
Texas & Pacific R'y.
Wabash railroad.

T. & Ft. S. No. 223-G. (Cancels No. 223-F.)

Port Arthur Route No. 922-F. (Cancels No. 922-E.)

Joint freight tariff applying on cotton and cotton linters, in bales any quantity, from Texarkana, Tex., to points named below; issued September 4, 1900; effective September 17, 1900.

Rates in cents per one hundred pounds. From Texarkana, Tex., to—	Cotton carrier's privilege of compressing (actual weight).	Uncompressed cotton linters, compressed or (actual weight). See note.
St. Louis, Mo.	60	45
Kansas City, Mo.	60	45
East St. Louis, Ill.	60	45
Carondelet, Mo.	60	45
St. Joseph, Mo.	60	45
Atchison, Kas.	60	45
Leavenworth, Kas.	60	45
New Orleans, (depot delivery,) La.	60	45
*New Orleans, (shipside delivery,) La.	63	..
Galveston, Tex.	60	45
Port Arthur, Tex.	60	45
New York, and common points, N. Y.	90	..
Boston, and common points, Mass.	95	..
Philadelphia, and common points, Pa.	88	..
Baltimore, and common points, Md.	87	..
Albany, Troy, Schenectady, and common points, N. Y.	85	..

* Rates shown above to "New Orleans, shipside" are to be used only as a basis in arriving at through rates on cotton for export. No contract will be made or bill of lading issued for "New Orleans, shipside delivery."

NOTE.—The rates shown on cotton linters do not include cost of compressing. If compression is desired, the cost must be borne by shipper or owner.

20 Demurrage and storage charges.

Shipments moved under this tariff are subject to storage and car service charges as published in Port Arthur Route rate circular No. 17, I. C. C. 429, where that company is the delivering line. When destined beyond, the storage or demurrage charge of the delivering line will govern.

Expires August 31, 1901.

M. L. SCOVELL,
G. F. A., T. & Ft. S. R'y Co.,
A. G. F. A., The K. C. So. R'y Co., Texarkana, Tex.

CHAS. E. PERKINS,
A. G. F. A., The K. C. So. R'y Co., Kansas City, Mo.

J. A. HANLEY,
F. T. M., The K. C. So. R'y Co., Kansas City, Mo.

E. E. SMYTHE,
G. F. A., The K. C. So. R'y Co., Kansas City, Mo.

Authority No. 3683.
Mailed to I. S. C. C. from Kansas City, Sept. 4, 1900.
T.-H. P't'g Co.—700.

Identified with bill of exception No. 1 in J. Cau *vs.* T. & P. R. W. Co. No. 12923. U. S. circuit court, eastern dist. La.
(Signed) CHAS. P., *J.*

(Indorsed:) No. 12923. U. S. circuit court. Filed May 17, 1901. (Signed) H. J. Carter, d'y clerk.

Form 119 revised. 9–'95.

The Texas & Pacific Railway Company.

Domestic Cotton Bill of Lading.

Received by Texas & Pacific Railway Company, in apparent good order and well-conditioned, of Jovite Cau, for delivery to Jovite Cau, or *their* assigns, at New Orleans, he or they paying freight and charges as per margin, the following articles, to say: Sixty-four (64) bales of cotton.

21 Bill of lading No. D # 2.
T. & P. contract No. —.
—— R. R. contract No. —.
From Texarkana, Texas, to New Orleans.
Route: Via T. & P. R. R.
—— ——.
64 B/C.
—— ——.
—— ——.

Gross weight pounds, 32156.
Through rate per 100 lbs. 60 cts.
Compressed rate.
—— ——.
Total freight, $—.
Advanced charges, $—

Office copy.

Number.	Marks.	
5 bls.....	F N C Y.....	2503
15 bls.....	M A R Y	7614
3 bls.....	L O Q O ...4	1598
18	A O J S.....	9299
9	C L O I.....	4[*]
6	C A G E.....	31
8	X T R A	3662
—		
64		32156

[*] (This part torn off from the original here.)

Upon the following terms and conditions, which are fully assented to *and* the owner, viz:

1. That the liability of the Texas & Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment or loss.

2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said
22 rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport, or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate.

3. That neither the Texas & Pacific Railway Company, nor any connecting carrier handling said cotton, shall be liable for damage to or destruction of said cotton by fire, nor for any loss or depreciation in the weight thereof, nor for any damage or injury thereto caused by water, moisture, decay, dirt, bursting or breaking of bagging or ties, nor for any other damage or injury thereto arising from imperfect baling or pressing; nor for any loss or damage thereto by

collision or any of the other dangers of navigation and perils of sea while on seas, gulfs, lakes, rivers and canals.

4. That the said cotton is subject, at its owner's cost, to the necessary repairs and baling; and the consignees are to pay freight and charges on said cotton in lots or parts of lots as delivered.

5. That if said cotton, or any part thereof, shall be lost, damaged or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company or any connecting carrier liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby. It is expressly agreed and understood that the recitation in this bill of lading, that the cotton was received "in apparent good order and well-conditioned," refers only to its external appearance, and if the said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show, affirmatively, that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted, as when received by it.

6. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton, or claimant, to establish that such injury resulted from the fault of the carrier.

7. That no suit or action against the Texas & Pacific Railway Company on any claim for damages arising from any breach of this contract, or injury to, or loss or destruction of said cotton,
23 shall be sustained in any court unless notice in writing, distinctly setting forth the claim, shall be given to the nearest or any other convenient local agent of said The Texas & Pacific Railway Company before the expiration of ninety days from the date of accrual of such claim; and in no event shall any suit or action in any court, for damages arising from any breach of this contract, or for damages or injury to, or loss or destruction of said cotton, or any part thereof be sustained, unless the same shall be commenced before the expiration of two years from the date when such breach, injury, loss or destruction occurred and the lapse of such time shall be conclusive evidence against the validity of such claim and demand.

8. Each carrier over whose route cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing the same in accordance with the rules and regulations promulgated by the Texas railroad commission governing the compressing of cotton, and no carrier shall be held responsible for delays in procuring such compression, and shall not be liable for loss or damage to cotton by any cause while in the compress or on side track or platform appurtenant thereto.

9. That the acceptance of the bill of lading shall be deemed con-

clusive proof of the assent of the owner of said cotton to all the terms and conditions written or printed hereon.

In witness whereof, the agent signing for the railway company hath affirmed to — bills of lading, of this tenor and date, one of which being accomplished the others to stand void.

Dated at ——, this 15th day of Sept., 1900.

—— ——, *Agent.*

Written across face in blue pencil: Original made out on form 1505.

(Stamped on reverse:) B 63139.

Map of the Texas & Pacific R'y and connecting lines, printed on reverse.

Written on reverse: No. 12923. U. S. court. Filed May 17, 1901. H. J. Carter, d'y clerk.

(Written on face:) Identified with bill of exception No. 1 in J. Cau *vs.* T. & P. R. W. Co. No. 12923. U. S. cirt c'rt, est. dist. La. (Signed) Chas. P., J.

24 Form 1505.

The Texas & Pacific Railway Company.

Interstate Cotton Bill of Lading.

Bill of lading No. 3.
T. & P. contract No. —.
—— R. R. contract No. —.

Received at Texarkana, from Jovite Cau, the following property, in apparent good order and well conditioned, except as noted, to wit: — bales of cotton, marked, consigned and destined as indicated below:

Number.	Marks.		
1 B/C.....	X I R H	Wght.....	517
4 B/C.....	M A R Y	Wght.....	2225
5 B/C.....	A R T S	.....	2640
2 B/C.....	2 L O L A	.....	1042
5 B/C.....	H A R E	.....	2714
			9238

From Texarkana, Tex., to New Orleans, La.
Route: Via T. & P. R. R.
Gross weight at point of shipment: Pounds, 9238 lbs.
Through rate per 100 pounds 60c., compressed rate.
Total freight, $—.
Advance charges, $—.

For delivery unto Jovite Cau or to order — assigns, notify Jovite Cau upon payment of freight charges as per margin.

In consideration of the rate of freight herein named, it is hereby

stipulated that the service to be performed hereunder shall be subject to the following terms and conditions, and said terms and conditions are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable:

Conditions.

1. That the liability of the Texas & Pacific Railway Company in respect to said cotton, and under this contract, is limited to its own line of railway, and it shall not be liable for any loss, detriment, or damage done to or sustained by said cotton not occurring on its own road, nor after said cotton has been delivered, or is ready for delivery to the next connecting carrier or consignee.

2. That the rate of freight for the transportation of said cotton, specified in the margin hereof, is quoted and guaranteed, with the distinct understanding, and only on condition that the weight of said cotton is truly and correctly represented and stated, and that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport, or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but it shall only bind said company to protect said rate.

3. That neither the Texas & Pacific Railway Company nor any other connecting carrier handling said cotton is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. That neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire, nor for any loss or depreciation in the weight thereof, nor for any damage or injury thereto caused by water, moisture, decay, dirt, bursting or breaking of bagging or ties, nor in any other damage or injury thereto arising from imperfect baling or compressing, nor for any loss or damage thereto by collision, nor any of the other dangers of navigation or perils of sea while on seas, gulfs, lakes, rivers and canals; nor for any loss thereof or damage thereto by causes beyond its control, or by floods; or by riots, quarantines, strikes or stoppage of labor.

4. That said cotton is subject at its owner's cost, to the necessary repairs and baling, and the consignees are to pay freight and charges on said cotton in lots or parts of lots as delivered.

5. Each carrier over whose route the cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing same, for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression.

6. That if said cotton, or any part thereof, shall be lost, damaged or destroyed by means or under circumstances rendering the Texas

& Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby.

7. It is expressly agreed and understood that the recitation in this bill of lading that the cotton was received "in apparent good order and well conditioned" refers only to its external appearance, and if said cotton is found damaged at the point
26 of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show affirmatively that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted, as when received by it.

8. This contract is executed and accomplished, and the liability of the Texas & Pacific Railway Company as common carrier under said contract is terminated on the delivery of said cotton to any connecting railroad carrier at the usual place set apart by said carrier for the receipt of cotton, or upon the delivery of said cotton to a steamship company, its master, agent or servants, or when said cotton shall have been unloaded on the wharf or steamship pier, or upon the platform or in the warehouse of the Texas & Pacific Railway Company, and the connecting carrier or consignee duly and reasonably notified thereof.

In witness whereof, the agent signing on behalf of the Texas & Pacific Railway Company hath affirmed to one bill of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

Dated at Texarkana, this 17th day of Sept., 1900.

(Signed) C. P. HOVEY, *Agent.*

Written across face, in blue pencil: Office copy.
(Written on reverse:) (Stamped.) B 63139. No. 12923. U. S. circuit court.

Filed May 17, 1901.
(Signed) H. J. CARTER, *D'y Clerk.*

Identified with bill of exception No. 1 in suit of J. Cau *vs.* T. & P. R. W. Co., No. 12923. U. S. circ. c'rt, east'n dist. La.

(Signed) CHAS. P., *J.*

Form 1505.

The Texas & Pacific Railway Company.

Interstate Cotton Bill of Lading.

Bill of lading No. 4.
T. & P. contract No. —.
—— R. R. contract No. —.

Received at Texarkana, from Jovite Cau, the following property, in apparent good order and well conditioned, except as noted,
27 to-wit: — bales of cotton, marked, consigned and destined as indicated below.

Number.	Marks.		
6 B/C.....	A R T E	W'ght.....	3041
4 B/C.....	W A R E	W'ght.....	2208
8 B/C.....	X L R A	W'ght.....	3872
1 B/C.....	3 M A R Y	W'ght.....	462
1 B/C	C A G E	W'ght.....	477
2 B/C.....	T A M E	W'ght.....	990
2 B/C.....	F N C Y	W'ght.....	924
			11974

From Texarkana, Tex., to New Orleans, La.
Route: Via ——.
Gross weight at point of shipment, 11974 lbs.
Through rate per 100 pounds. 60c.
Compressed.
Total freight, $—.
Advance charges, $—.
For delivery unto Jovite Cau or to order — assigns, notify Jovite Cau upon payment of freight and charges as per margin.

In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the following terms and conditions, and said terms and conditions are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable:

Conditions.

1. That the liability of the Texas & Pacific Railway Company in respect to said cotton, and under this contract, is limited to its own line of railway, and it shall not be liable for any loss, detriment, or damage done to or sustained by said cotton not occurring on its own road, nor after said cotton has been delivered, or is ready for delivery to the next connecting carrier or consignee.

2. That the rate of freight for the transportation of said cotton, specified in the margin hereof, is quoted and guaranteed, with the distinct understanding, and only on condition that the weight of

said cotton is truly and correctly represented and stated, and that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport, or to become
28 in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but it shall only bind said company to protect said rate.

3. That neither the Texas & Pacific Railway Company nor any other connecting carrier handling said cotton is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. That neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire, nor for any loss or depreciation in the weight thereof, nor for any damage or injury thereto caused by water, moisture, decay, dirt, bursting or breaking of bagging or ties, nor in any other damage or injury thereto arising from imperfect baling or compressing, nor for any loss or damage thereto by collision, nor any of the other dangers of navigation or perils of sea while on seas, gulfs, lakes, rivers and canals; nor for any loss thereof or damage thereto by causes beyond its control, or by floods; or by riots, quarantines, strikes or stoppage of labor.

4. That said cotton is subject at its owner's cost, to the necessary repairs and baling, and the consignees are to pay freight and charges on said cotton in lots or parts of lots as delivered.

5. Each carrier over whose route the cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing same, for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression.

6. That if said cotton, or any part thereof, shall be lost, damaged or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby.

7. It is expressly agreed and understood that the recitation in this bill of lading that the cotton was received "in apparent good order and well conditioned" refers only to its external appearance, and if said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show affirmatively that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted, as when received by it.

29 8. This contract is executed and accomplished, and the liability of the Texas & Pacific Railway Company as common

carrier under said contract is terminated on the delivery of said cotton, to any connecting railroad carrier at the usual place set apart by said carrier for the receipt of cotton, or upon the delivery of said cotton to a steamship company, its master, agent or servants, or when said cotton shall have been unloaded on the wharf or steamship pier, or upon the platform or in the warehouse of the Texas & Pacific Railway Company, and the connecting carrier or consignee duly and reasonably notified thereof.

In witness whereof, the agent signing on behalf of the Texas & Pacific Railway Company hath affirmed to one bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

Dated at Texarkana, this 17th day of Sept., 1900.

(Signed) C. P. HOVEY, *Agent.*

Written across face, in blue pencil: Office copy.

(Written on reverse:) (Stamped.) B 63139. No. 12923. U. S. circuit court.

Filed May 17, 1901.

(Signed) H. J. CARTER, *D'y Clerk.*

Identified with bill of exception No. 1 in suit of J. Cau *vs.* T. & P. R. W. Co., No. 12923. U. S. circ. c'rt, east'n dist. La.

(Signed) CHAS. P., *J.*

Form 1505.

The Texas & Pacific Railway Company.

Interstate Cotton Bill of Lading.

Bill of lading No. 5.
T. & P. contract No —.
—— R. R. contract No. —.

Received at Texarkana, from Jovite Cau, the following property, in apparent good order and well conditioned, except as noted, to-wit: — bales of cotton, marked, consigned and destined as indicated below:

Number.	Marks.	
3 B/C.....	L O L A.....	1643 lbs.
2 B/C.....	D A M E.....	998
		2641 lbs.

30 From Texarkana, Tex., to New Orleans, La.
Route: Via. ——.
Gross weight at point of shipment, 2641 lbs.
Through rate per 100 pounds 60c.
Compressed rate.
Total freight, $—.
Advance charges, $—.

For delivery unto Jovite Cau or to order — assigns, notify Jovite Cau upon payment of freight and charges as per margin.

In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the following terms and conditions, and said terms and conditions are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable:

Conditions.

1. That the liability of the Texas & Pacific Railway Company in respect to said cotton, and under this contract, is limited to its own line of railway, and it shall not be liable for any loss, detriment, or damage done to or sustained by said cotton not occurring on its own road, nor after said cotton has been delivered, or is ready for delivery to the next connecting carrier or consignee.

2. That the rate of freight for the transportation of said cotton, specified in the margin hereof, is quoted and guaranteed, with the distinct understanding, and only on condition that the weight of said cotton is truly and correctly represented and stated, and that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport, or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but it shall only bind said company to protect said rate.

3. That neither the Texas & Pacific Railway Company nor any other connecting carrier handling said cotton is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. That neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire, nor for any loss or depreciation in the weight thereof, nor for any damage or injury thereto caused by water, moisture, decay, dirt, bursting or breaking of bagging or ties, nor in any other
31 damage or injury thereto arising from imperfect baling or compressing, nor for any loss or damage thereto by collision, nor any of the other dangers of navigation or perils of the sea while on seas, gulfs, lakes, rivers and canals; nor for any loss thereof or damage thereto by causes beyond its control, or by floods; or by riots, quarantines, strikes or stoppage of labor.

4. That said cotton is subject at its owner's cost, to the necessary repairs and baling, and the consignees are to pay freight and charges on said cotton in lots or parts of lots as delivered.

5. Each carrier over whose route the cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing same, for greater convenience in handling and forwarding, and shall not

be responsible for deviation or unavoidable delays in procuring such compression.

6. That if said cotton, or any part thereof, shall be lost, damaged or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby.

7. It is expressly agreed and understood that the recitation in this bill of lading that the cotton was received "in apparent good order and well conditioned" refers only to its external appearance, and if said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show affirmatively that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted, as when received by it.

8. This contract is executed and accomplished, and the liability of the Texas & Pacific Railway Company as common carrier under said contract is terminated on the delivery of said cotton to any connecting railroad carrier at the usual place set apart by said carrier for the receipt of cotton, or upon the delivery of said cotton to a steamship company, its master, agent or servants, or when said cotton shall have been unloaded on the wharf or steamship pier, or upon the platform or in the warehouse of the Texas & Pacific Railway Company, and the connecting carrier or consignee duly and reasonably notified thereof.

In witness whereof, the agent signing on behalf of the Texas & Pacific Railway Company hath affirmed to one bills of
32 lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

Dated at Texarkana, this 17th day of Sept., 1900.

(Signed) C. P. HOVEY, *Agent.*

Written across face, in blue pencil: Office copy.

(Written on reverse:) (Stamped.) B 63139. No. 12923. U. S. circuit court.

Filed May 17, 1901.

(Signed) H. J. CARTER, *D'y Clerk.*

Identified with bill of exception No. 1 in suit of J. Cau *vs.* T. & P. R. W. Co., No. 12913. U. S. circ. c'rt, east'n dist. La.

(Signed) CHAS. P., *J.*

Suit pending in the United States circuit court of eastern district of Louisiana.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

Answers and depositions of George West and F. W. Offenhauser, a resident of the county of Bowie, in the State of Texas, to the accompanying interrogatories propounded to them in the above-entitled cause, taken before W. E. Estes, notary public in and for Bowie county, Texas, in accordance with the accompanying commission.

Answers of the Witness George West.

To the first interrogatory he answers:

My name is George West. I am 34 years old. My business is superintendent of the Union Compress Company, Texarkana, Texas. Residence, Texarkana, Texas.

To the second interrogatory he answers:

I have a knowledge of the 110 bales mentioned in the interrogatory, which were of various marks. I was manager of the compress at the time and had to receive and receipt for the same.

To the third interrog-tory he answers:

It was totally destroyed by fire. It was situated at the
33 Union compress at Texarkana, Texas. At the time of the destruction of said cotton it was covered by insurance.

To the fourth interrogatory he answers:

It is natural for me to suppose that they had been, for the reason that I had received receipts from the railroad company covering this cotton.

To the fifth interrogatory he answers:

The Union Compress Company carried insurance to protect the transportation companies against loss by fire on all cotton for which they have signed bills of lading until said cotton is loaded back into their cars. The railroad companies are notified each day of the number of bales of cotton in the possession of the compress company for the railroad company's account.

To the sixth interrogatory he answers:

The practices and procedure before stated was strictly followed in the case of the cotton to which these interrogatories refer.

To the seventh interrogatory he answers:

The Union Compress Company carried an adequate amount of insurance written in favor of the Texas & Pacific railroad to cover any loss by fire of cotton covered by their bills of lading. The insurance was procured by the Union Compress Company as liabilities demanded. Such insurance was usually procured through F. W. Offenhause- Insurance Company, policies being delivered to the agents of the Texas & Pacific Railway Company.

To the eighth interrogatory he answers:
It was.
To the ninth interrogatory he answers:
I have stated all I know in the premises.
(Signed) GEO. WEST.

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To the first cross interrogatory George West answers:
I was manager of the compress company and must neces-
34 sarily therefore know that the cotton was in the care of the compress company and was insured in favor of the Texas & Pacific Railway Company.
To the second cross interrogatory he answers:
Insurance was written in favor of the railroad company and policies turned over to their agents by Messrs. Offenhauser & Co.
To the third cross interrogatory he answers:
I have no positive evidence of bills of lading having been issued but it is usually the case that bills of lading have been issued when compress receipts are returned to me by the railroad company for signature acknowledging the Union Compress Company's custody of cotton until same is pressed and given into the charge of the railroad company by loading or delivery to them in their cars.
To the fourth cross interrogatory he answers:
The Union Compress Company expected no bill of lading.
To the fifth cross interrogatory he answers:
I cannot answer. Do not know.
To the sixth cross interrogatory he answers:
I do not know.
To the seventh cross interrogatory he answers:
Information was conveyed by me to R. R. company's agent.
To the eighth cross interrogatory he answers:
Policies I suppose are in possession of the T. & P. R'y Co.
(Signed) GEO. WEST.

Answers of the Witness F. W. Offenhauser.

To the first interrogatory he answers:
My name is F. W. Offenhauser. I am 39 years of age. My occupation is insurance agent. Place of residence Texarkana, Arkansas.
To the second interrogatory he answers:
I know nothing of the 110 bales marked as per interrogatory No. 2.
35 To the third interrogatory he answers:
I know nothing of this particular cotton having been burned. The Union Compress Company's buildings and platforms

in Texarkana, Texas, were destroyed by fire September 19th, 1900, in which about fifteen hundred (1500) bales of cotton belonging to various parties were destroyed by fire. This cotton was all covered by insurance.

To the fourth interrogatory he answers:

I have no personal knowledge of bills of lading having been issued on any of this cotton.

To the fifth interrogatory he answers:

I have no knowledge of the practice in vogue between the Union Compress Company at Texarkana and the T. & P. R'y Co., with reference to the manner in which they conducted the cotton business as between themselves.

To the sixth interrogatory he answers:

The same answer as to interrogatory number five above.

To the seventh interrogatory he answers:

The practice or course of dealing of the Union Compress Company as to insurance against loss or damage to cotton by fire while in its possession or custody for which bills of lading had been issued, was, to effect insurance for the benefit and in the name of each particular railroad compressing cotton at their press. This rule applied to all cotton coming in the possession of the compress company for account of railroads. I do not know that the particular 110 bales mentioned was covered by insurance, but as it was the custom of the compress company to protect the railroads as above stated, I presume the cotton mentioned was insured under policies held by the Texas & Pacific Railway Company. The insurance policies in the case of the Texas & Pacific Railway Company were delivered to V. E. Buron, clerk in the employ of C. P. Hovey, agent for the Texas & Pacific Railway Company in Texarkana.

To the eighth interrogatory he answers:

I do not know whether the particular cotton mentioned was destroyed by fire or not, nor do I know whether or not the insurance held by the Texas & Pacific road covered the cotton in question.

36 To the ninth interrogatory he answers:

I have answered all I know.

(Signed) F. W. OFFENHAUSER.

U. S. Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

To the first cross interrogatory the said F. W. Offenhauser answers:

Information obtained from V. E. Buron, chief clerk of C. P. Hovey, agent at Texarkana for the T. & P. R'y Co.

To the second cross interrogatory he answers:

As agent of the insurance company I caused these policies to be issued and delivered them at the office of the T. & P. R'y Co., at Texarkana.

To the third cross interrogatory he answers:
Know nothing about the understanding as to the B/L issued in this transaction.
To the fourth cross interrogatory he answers:
Know nothing about this bill of lading.
To the fifth cross interrogatory he answers:
Same answer as last above.
To the sixth cross interrogatory he answers:
Same answer as the last above.
To the seventh cross interrogatory he answers:
Same answer as above.
To the eighth cross interrogatory he answers:
The insurance mentioned was issued by me and policies delivered to the agent of the T. & P. R'y Co. at Texarkana.

(Signed) F. W. OFFENHAUSER.

THE STATE OE TEXAS, }
County of Bowie. }

37 I, W. E. Estes, a notary public in and for Bowie county, Texas, do hereby certify that the foregoing answers to interrogatories and cross interrogatories of Geo. West and F. W. Offenhauser, the witnesses before named, were made before me, and were sworn to and subscribed before me on the 13th day of May, A. D. 1901, by the said witnesses Geo. West and F. W. Offenhauser.

Given under my hand and official seal, this the 13th day of May, A. D. 1901.

(Signed) W. E. ESTES,
[SEAL.] *Notary Public, Bowie County, Texas.*

(Indorsed:) Depositions of Geo. West and F. W. Offenhauser. Identified with bill of exception No. 1 in suit J. Cau *vs.* T. & P. R. W. Co., No. 12923, U. S. circuit court eastern dist. La. Chas. P. J.

Texas cotton form—Common carrier.

On cotton in bales, for which bills of lading have been issued by their duly authorized agents, and for which they shall be legally liable for loss or damage by fire, while contained on compress platforms and in cars on switches adjacent thereto situate — Texarkana, Texas.

It is understood and agreed that the basis for adjustment of any claim for loss or damage to the property covered by this policy shall not exceed the actual cash market value of such property at the time of the loss and at the place of fire, which cash market value shall in no event be greater than it would then and there cost to place the property damaged or destroyed with property of the same kind and quality.

And it is further understood and agreed that if at the time of fire the whole amount of insurance on the property covered by this

policy shall be less than the actual cash market value thereof, this company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the actual cash market value of such property at the time and place of fire.

Other concurrent insurance permitted without notice until required.

This form is attached to, and made a part of, policy No. 8481, certificate No. — of the Hartford Fire Insurance Company of Hartford, Conn.

F. W. OFFENHAUSER & CO., *Agent*.

38 NOTE.—Agents will sign and attach one each to policy, daily report and register.

(Written across face:) Identified with bill of exceptions No. 1 in Cau *vs.* T. & P., No. 12923, U. S. circ. c'rt. Chas. P., J.

(Indorsed:) Def't 1, No. — U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed 17th May, 1901. E. R. Hunt, clerk.

United States Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
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Index.

* * * * * * *

The following testimony and notes of evidence are hereby identified with plaintiff's bill of exception No. 1 in the suit of J. Cau *vs.* T. & P. R. W. Co., No. 12923, U. S. circ. c'rt, eastern dist. La. Chas. P., J.

United States Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

NEW ORLEANS, LA., *May 17th*, 1901.

The court met this day pursuant to adjournment.
Present: His Honor Charles Parlange, judge, with a jury.
Present: Branch K. Miller, Esqr., for the plaintiff.
Howe, Spencer & Cocke, and F. N. Finlay, Esqrs., for the defendant.

Plaintiff's return on service of *subpœna duces tecum*.

V. W. PONS, sworn for the plaintiff on return of writ says:

By Mr. MILLER:

Q. What is your business?
A. I am cotton buyer and manager of Mr. Cau.
39 Q. Mr. Cau, the plaintiff in this case?
A. Yes, sir.
Q. Is Mr. Cau present in New Orleans, now?
A. No, sir.
Q. Where is he?
A. In Europe, or on his way to Europe.
Q. You are in charge of his business here?
A. Yes, sir.
Q. The plaintiff, that is Mr. Cau, was ordered by the court to produce this morning all policies of marine insurance that he might have in his possession, or under his control, covering, or insuring the loss by fire of the cotton described in the petition in this case. Are there any such policies of insurance?
A. No, sir; and never was any.
Q. They are not in the possession of Mr. Cau?
A. No, sir.
Q. You would know the fact if they were?
A. Yes, sir.
Q. You have special charge of his business here?
A. Yes, sir.
Q. You know there was no insurance taken out?
A. Yes, sir; none.
Q. Consequently you have no policy of insurance in your possession now?
A. No, sir.

Cross-examined by Mr. SPENCER:

Q. Do I understand you to say that you had no insurance policies at all?
A. No, sir; none on that cotton; that was local cotton shipped from Texarkana to New Orleans.

Q. Did you not have insurance policies on it in the interior, until it reached you, as your cotton?

A. No, sir; I bought that cotton; and I had no insurance on the cotton that I bought; I only have insurance when the cotton leaves New Orleans on the steamer.

Q. Have you made any claim against any insurance company on account of the loss of this cotton?

A. No, sir; none at all.

Q. Have you got any open marine insurance policies at all?

A. No, sir.

Q. I understand you to say you have no open marine insurance policies at all?

A. No, sir; I have not, not in the business I have been doing; we have marine insurance policies on the cotton after it leaves New Orleans on the steamer, but that has nothing to do with this case.

40 On the merits.

V. W. Poxs, sworn for the plaintiff, says:

By Mr. Miller:

Q. Where were you located in business during the month of September last?

A. At Texarkana, Texas.

Q. Were you in business there for yourself, or for somebody else?

A. No, sir; not for myself, but I was for Mr. Jovite Cau.

Q. You represented Mr. Cau at Texarkana, Texas?

A. Yes, sir.

Q. What was Mr. Cau's business?

A. A cotton exporter.

Q. He would have to buy the cotton first and export it afterwards?

A. Yes, sir.

Q. You were then in Texarkana, purchasing cotton for Mr. Cau?

A. Yes, sir; as his cotton buyer.

Q. Are you familiar with the delivery of the 110 bales of cotton which are concerned in this case?

A. Yes, sir.

Q. You bought the cotton personally?

A. Yes, sir; I did.

Q. You bought it for Mr. Cau?

A. Yes, sir.

Q. You bought it for what purpose?

A. For the purpose of shipping it to New Orleans and then to Europe.

Q. Did you deliver, or have it delivered to any common carrier, or railroad for the purpose of being brought from Texarkana to New Orleans?

A. Yes, sir.

Q. Did you do anything towards ascertaining what the rates were and what kind of contracts you could obtain for the purpose of having that cotton brought to New Orleans?
A. I did.

Mr. Spencer for the defendant inquires the purpose of this examination.

Mr. MILLER: I wish to show by the witness that he applied to the defendant company to know what rate of freight he could obtain transportation for the cotton from Texarkana to New Orleans; that he was informed that the rate was 60 cents per 100 pounds. I wish to show that that certain rate only was given him; that he inquired if there was any other rate and he was told no; that was the only rate, and therefore he made the contract to carry it at that
41 rate. The object of the testimony is to show that he was allowed no option whether he would ship his cotton under the general common law liability of the carrier for which he would pay a higher rate, or ship it under the limited liability of the carrier at a lower rate, and that he had no opportunity to choose between the two.

Mr. SPENCER: Upon the statement of the counsel of the object of the testimony, we object for the defendant, on the grounds: first, that the evidence is not admissible under the pleadings, as the plaintiff has not specially pleaded this as a ground of nullity of the contract, or any portion thereof; second, on the ground that the testimony in any event is irrelevant, incompetent and immaterial, and that the plaintiff is estopped from alleging or proving the facts sought to be here proved.

The COURT: Estopped by what?

Mr. SPENCER: He is estopped by the fact that he has sued upon this contract, and it is a conclusive presumption that this rate of freight was based upon the limited liability of the defendant company.

Mr. Miller thereupon withdraws the question.

Q. When you got this bill of lading from the defendant company, were you informed, or was any consideration paid to you for allowing you to go into the stipulation, freeing the defendant company from any liability for loss of, or damage to, this cotton by fire? Was anything given to you for that?

Mr. Spencer, for the defendant, objects to the inquiry on the ground that it is a conclusive presumption, that having accepted the bill of lading at the rate specified therein, under the conditions therein set forth, that the rate was based upon the terms, conditions and limitations of the bill of lading.

The court overruled the objection, and Mr. Spencer reserved exception.

A. No, sir.

Q. When you obtained this bill of lading, were you given any op-

tion, as to what rate you should pay, for the bringing of that cotton from Texarkana to New Orleans?

Mr. Spencer urges the same objection. And it is agreed that this objection is to apply without the necessity of repetition to all testimony relating to the circumstances under which the bill of lading was issued to the plaintiff, subject to the same ruling of the court and the same reservation of exception.

42 A. No, sir; none.

Q. Did you inquire at what rate of freight the defendant company would carry that cotton to New Orleans?

Mr. Spencer objects to leading the witness.

Q. What passed between you and the agent of the defendant company, on the issuance of this bill of lading, or what happened between you and the agent just before; state everything that took place from beginning to end?

A. When I applied to the agent of the Texas & Pacific railroad for a rate to New Orleans, on the cotton I was going to ship, he told me I could get but one rate, 60 cents per 100 pounds, that that was the rate of the other roads. And I gave them the cotton because it was the most direct line to New Orleans. I simply went there to get the rate, and I simply gave them the cotton at that rate which they gave me, 60 cents per 100 pounds.

Q. What was the reply made by the agent of the defendant company at Texarkana, as to what rate you should get?

A. He told me that there was but one rate I could get.

Q. Were you aware of any documents, circulars, or anything of that kind issued by the defendant company, or in its behalf, at Texarkana, purporting to show the rates of transportation from Texarkana to New Orleans?

A. Well, as far as advertisements are concerned, I do not know of any, but I know of the tariff, that all the roads have the same tariff.

Q. How do you know anything about that tariff?

A. Because I applied to all the roads.

Q. Did you apply to the defendant roads?

A. Yes, sir.

Q. Were you given the tariff?

A. No, sir; they said they had but two copies there, they had to keep them in the office.

Q. Tell me how you got that paper, or how did you get into possession of it?

A. I got it by applying to the other roads, to whom I made application.

Q. To what roads did you apply?

A. I applied to the various roads, about there leading out of Texarkana to New Orleans.

Q. You got this paper from what railroad company in Tex arkana?

A. From one of them; see that one that I applied to—the Kansas City & South- railroad; that is the one that gave it to me; I could not get it from any other road.

43 Q. What was the purpose of applying for the information furnished you by this sheet of paper?

A. To see what the rates were to New Orleans over all the roads in the interest of my business; the railroads cannot give any cheaper rate.

Mr. Miller for the plaintiff offers in evidence the paper testified to by the witness, a circular printed upon yellow paper, headed with the words, "Kansas City & Southern Railway Co. and Texarkana & Fort Smith Railroad Co.," in connection with a number of railroads, among others, the defendant road.

Q. What was the value of this cotton?

A. I do not remember it exactly; I had it in my invoices, but I cannot swear to it now.

Q. Examine this paper and see, a memorandum made by yourself, by which you can state?

A. $5,754.93.

Q. That was the value whereabouts; in Texarkana, or New Orleans?

A. That was the value in Texarkana when I shipped it, I give there the correct amount of what I paid out.

Q. Whom did the cotton belong to?

A. I bought it at one bale to 110 bales from different parties.

Q. Whose property was that cotton when it was destroyed by fire?

A. It belonged to Mr. Cau.

Q. You received the bills of lading for this cotton?

A. Yes, sir.

Q. Will you please look at this paper that I hand you, and state whether or not, that is, and also the others, the bills of lading that you received for the 110 bales of cotton?

A. Yes, sir; they are.

Mr. MILLER: Without prejudice to the claim made in the petition, and insisted upon by the plaintiff in this case, that he is not bound by the third clause of the bills of lading spoken of by the witness, in the absence of any consideration for the stipulation therein contained, and for the purpose of showing delivery of the cotton to the defendant company, as a common carrier, for the purpose of transporting the same from Texarkana, Texas, to New Orleans, Louisiana, I now offer in evidence:

One bill of lading for 5 bales of cotton, dated Texarkana, September 11th, 17th, 1900.

One bill of lading bearing the same date and place for 17 bales of cotton.

One bill of lading dated the same, September 17th, for 24 bales of cotton.

One bill for 64 bales of cotton of same date, making in all
44 110 bales; which are marked respectively, 1, 2, 3, 4; and also the tariff sheet, which is marked 5.

Mr. Spencer for the defendant objects to the offer, as limited by plaintiff's counsel, for the reason that the contract is an entire contract, and he cannot avoid the effect thereof, by any such limitation of his offer.

The court overruled the objection and Mr. Spencer for defendant reserved exception.

Cross examined.

By Mr. SPENCER:

Q. I show you these four bills of lading, marked 1, 2, 3 and 4, and ask you by whom the description of the cotton and all the writing except the signature of the agent were they made out?

A. By whom they were made out?

Q. Yes.

A. I made them out.

Q. You made out these bills of lading yourself?

A. No, sir; not this one the agent made that one at Texarkana.

Q. The bill of lading marked 4, you say was made out by the agent at Texarkana?

A. Yes, sir; in fact I do not know who made it, but it was made for my benefit.

Q. Was not this bill of lading marked 4 made out by the agent, because the bill of lading as made out by you, was erroneously made out?

A. No, sir; because he had not the bill of lading at that time, that I made out.

Q. Had you made out the bill of lading to represent the cotton shipped under bill of lading No. 4?

A. Yes, sir.

Q. What did you do with it?

A. I gave it to the railroad company.

Q. They then made a copy of it and gave you this?

A. Yes, sir.

Q. Did you present the bill of lading yourself, as made out by yourself to the agent for signature?

A. Yes, sir.

Q. Where were these bills of lading made out, in your office?

A. Yes, sir; in my office at Texarkana.

Q. Then you took these bills of lading and carried them out to the railroad office to the agent for his signature?

A. Yes, sir.

Q. You had the blank bills of lading in your possession?

A. Yes, sir; of those that I made out.

Q. This conversation that you testified to, that you had with the agent of the Texas & Pacific Railway Co., when did that occur?

A. That occurred at the time I went to get my bills of lading signed, to get the rate.

45 Q. What did you ask him?

A. I asked him what was the rate to carry cotton to New Orleans, whether there was but one rate, and he said there was but one rate and he could not give me any other rate.

Q. Did you ask him to give you bills of lading without the fire clause?

A. No, sir.

Q. Did you tell him that you wanted to ship your cotton under the common law liability of the common carrier, and that you were willing to pay the rate for the same, or under a bill of lading exempting the carrier from loss or damage by fire?

A. I do not understand that very well.

Q. What I mean to say is this; did you tell the agent, of whom you asked for the rate, that you did not want any fire clause in any bill of lading which he might issue to you?

A. No, sir.

Q. Did you tell him that you wanted to ship your cotton without any fire clause in the bill of lading?

A. No, sir; because I did not know it was in the bill of lading.

Q. Therefore you made no application to him then for a rate based on a bill of lading, not containing the fire clause?

A. I made no application that way; I made no inquiries; I just asked for the rate.

Q. That was all the conversation you had with him on that subject?

A. On that subject? I had a little more, because every time I went for a bill of lading, I asked him.

Q. What did you mean by asking him whether that was the only rate?

A. Because I wanted to be sure what I was doing.

Q. In other words, you wanted to be sure that you would get the lowest market price?

A. No, sir; but to know that I would not be stuck in for my price on the cotton.

Q. But you wanted to know the lowest rate, did you not?

A. No, sir; I asked for the correct rate; I knew there was but one rate, because the other roads had the same rate, and it was against the law to give other rates; I did not ask him that.

Q. You wanted to know what the tariff rate was?

A. Yes, sir; for all the roads.

Q. And further than that you did not care?

A. Of course, I cared.

Q. What I mean is this, that you did not ask him—you were not seeking to ship your cotton under the common law liability?

A. I was not seeking for any obligation at all, I wanted the correct thing all the time, or the correct rate.

Q. What did you say the value of the cotton was?

A. Just as you see it written in my statement there.

Q. Is this the price you paid for this cotton in Texarkana,
46 Texas?

A. I paid various prices and that is the average price; I bought from one bale to 110 bales from different parties on the street, and paid for it at the time.

Q. Then you are not able to state whether that is the actual value of the cotton or not?

A. Yes, sir; I can swear to it.

Q. How can you swear to it, unless you know that was the price you paid?

A. In making up the average, I knew what my bank account showed, and how I came out.

Q. Your bank account?

A. Yes, sir; I knew every day, what was the average price I paid out for cotton; I am here to make no profit on it, I am on a salary.

Q. I notice you put down here, $5,754.93?

A. Yes, sir.

Q. I want to know is that the actual amount that you paid for that cotton?

A. Yes, sir; I do not remember exactly, but I suppose it is.

Q. What do you mean by saying that it is the average?

A. Because I bought the cotton at different prices, 9, 1/4 or 9/15 or other figures, and what I paid out for all could be made up that way.

Q. That is on all that cotton that you had?

A. Yes, sir.

Q. Have you figured any profit in here, or only the actual cost?

A. No, sir; no profit, exactly the cost; I am a salaried man, and I get no profit at all; the cotton is shipped from here to Europe to the mills.

Q. Have you figured the freight in here?

A. No, sir.

By the COURT:

Q. Is that the actual cost of the cotton to you, over there in Texas?

A. Yes, sir; as we usually do; I have been 15 years in the business.

By Mr. MILLER:

Q. You say you did not ask this agent to give you a contract, under which the defendant would be liable under the common law for the loss of this cotton?

A. I did not.

Q. You say you asked him what the rate was?

A. I asked him what was the rate; I did not want any obligation from him, or anything at all.

Q. And his answer was, what?

A. He said, we have but one rate, 60 cents and you cannot get it any cheaper or dearer.

Q. Allowing that his reply to you was only one rate, was anything said by him as to the different kinds of contracts you could get?

A. No, sir; he never said anything to me at all.

Q. Were you or not informed that you could get a contract under which the company would be liable, as insurer practically,
47 and another kind of contract under which they would not be liable for loss in case of fire?

A. No, sir.

Q. Did you have any information, or did you know that if you wanted to make a choice between these two, that you could do it?

A. No, sir.

Mr. Spencer objects to this testimony as irrelevant, as to whether he knew it or not, as absolutely immaterial.

The court overruled the objection and Mr. Spencer reserved exception.

Q. Were, or were you not, offered any option, or choice of selection as to the kind of contract under which you would ship this cotton?

A. I was not.

Q. I believe you stated that there was nothing within your knowledge that informed you what kind of contract you could get, or whether you could get more than one kind?

A. No, sir; I did not know anything about that.

Q. You stated in your testimony that one of the bills of lading which is offered in evidence, was made out by yourself?

A. No, sir; they were all made out by themselves.

Q. You did not sign that one?

A. No, sir; I did not sign that one.

Q. You filled up all except the signature and the date?

A. Yes, sir; of the shipment.

Q. Where did you get these bills of lading that you filled up in that way?

A. From the agent in Texarkana, of the Texas & Pacific Railway Co.

Q. You got these bills of lading from him?

A. Yes, sir.

Q. How did you come to get them from him?

A. By asking him.

Q. What did you ask him for?

A. I asked him for bills of lading for cotton to New Orleans.

Q. And he gave you these?

A. Yes, sir.

Q. And you used them; what I mean is, you did not make them up yourself; you got them from the agent of the company, itself?

A. Yes, sir.

Q. I believe you stated that something was said by the agent to the effect of his only having one kind of bill of lading; did you or not?

A. Yes, sir.

Q. Will you please repeat what you said?

A. I asked the agent for bills of lading for cotton to New Orleans, and he told me that they had only one bill of lading and he gave it to me.

Q. Will you pick out from among these, the bill of lading
48 which you were informed was the only one that they had?

A. They gave me these three here, and they told me this was the same, that they would take the cotton at the same rate.

Q. Do you mean that the only difference in that one was white and the other yellow; that one was printed in black ink and the other in purple ink?

A. Yes, sir; I asked them if this would take my cotton to New Orleans in the same way, and they said, yes.

Q. Tell us exactly, if you can, what was said by the agent of the company to you, about his having only one form of bill of lading, or one kind of bill of lading, or whatever it was he told you had one kind?

A. He gave me one form first, and when he did not have any more he gave me the other; he must have run out of them, I suppose.

Q. He had only what he gave you at the time?

A. Yes, sir.

Q. So if you wanted any other kind, could he have given it to you according to his own statement?

A. I do not suppose he could.

Q. Pick out from these bills of lading I hand you and give me the one kind of form that he said he had at that time that you asked for?

A. These three here; I do not remember the other transaction so very well. If I thought there was going to be a fire, I would have taken down everything word for word.

Q. This yellow bill of lading is the one that you made out, first?

A. No, sir; I do not know that, I cannot say by the dates.

Q. What I want to find out is, what is the bill of lading represented to you by the agent as being the only kind or form of bill of lading that he had at the time you got it?

A. This first one, that is the first one I got, No. 4.

Q. You had this at your office?

A. Yes, sir.

Q. You had this bill of lading at your office when *I* (it) was filled up?

A. Yes, sir.

Q. You had obtained it from the company?

A. I really cannot explain that.

Q. Tell me who you got this bill of lading from?

A. Yes, sir; I got the bill of lading from him; I got the blanks in order to fill them in for them to sign.

A. I want to know whether you got this bill of lading that you filled up from the defendant company; how did you get this blank form?

A. If that is my bill of lading, I got it from the Texas & Pacific Railroad agent.

Q. Given to you by the company?

A. Yes, sir.

Q. Was it given to you voluntarily, or did you ask for it?

A. I asked them for a bill of lading to New Orleans.

49 Q. You asked them for a bill of lading and they gave you this?

A. Yes, sir.

Q. Was any explanation made to you at the time, when you received this bill of lading, whether it was the only kind you could get, or whether you could get another kind?

A. No, sir.

Q. No explanation of that kind given to you?

A. No, sir.

Q. How did the other bills of lading which you hold in your hand, marked 1, 2, and 3 come into your possession?

A. By asking for them. When I went there, I said, this is a different kind of a bill of lading; and he said, No, they are of the same form.

Q. Whom did you get them from?

A. From the Texas & Pacific agent at Texarkana.

Q. Was there anything said to you, at the time they were given to you by the agent of the defendant company, as to whether that was the only form or kind of bill of lading the had, or whether he could furnish you with other forms, or kinds of bills of lading if you wished them?

A. No, sir; he did not say anything about it; he answered me that way before, when I asked him; it was understood, he would give me the correct bills of lading.

By Mr. SPENCER:

Q. How is that bill of lading headed, which you hold in your hand?

A. Texas & Pacific Railway Co., interstate bill of lading.

Q. And this one No. 4, is a domestic cotton bill of lading?

A. Yes, sir.

Q. You know enough of the cotton business to know that there are three or four different kinds of bills of lading used for different classes of shipment?

A. No, sir; I know you can take an interstate bill of lading and ship cotton to a domestic point; I can use this bill of lading for the same purpose as I could the other one.

Q. Did you ever examine to see what the difference between that bill and this bill is?

A. No, sir; but I know that the agent will sign it the same.

Q. That bill of lading covers it by steamer also?

A. Yes, sir; if you say it, to Havre, or so on, and to New Orleans in the same way.

Q. What is the form number of that bill of lading?

A. Form 1505, I think.
Q. And the form of this bill of lading is 119?
A. Yes, sir?
Q. When you ship cotton, how many sets of bills of lading
50 do you get for each shipment?
A. Sometimes three and sometimes, two.
Q. How many did you get in this case?
A. I do not remember, I may have got two or three.
Q. What is the meaning of this marking on bill of lading No. 4, "Original made out on form 1505?
A. Because they did not have the other and they gave me this form.
Q. In other words, they gave you this because they had run out of the other form?
A. Yes, sir; it was simply a copy anyhow, which they could have given me on a piece of paper.
Q. What you wanted was an interstate bill of lading?
A. No, sir; I wanted a bill of lading to New Orleans.
Q. You did not care what kind you got?
A. Yes, sir; I did, I wanted the correct kind.
Q. You say you were not offered any option?
A. No, sir; I was not.
Q. Did you ask for any?
A. No, sir; I would not dare to ask for any, because I knew it was against the law, as I thought it was.
Q. That is why you did not ask for it?
A. I did not dare to ask for it.
Q. The reason is, that you did not know, in the first place, what was in the bill of lading?
A. No, sir; I did not read the bill of lading at all; I know I have been in the business 15 years, and never had this trouble before, the other roads paid me for the cotton when it was burned.
Q. Did you use this bill of lading in the bank, or did you send it to the bank?
A. Yes, sir; I sent that through the bank to my house in New Orleans.
Q. That is the reason you applied to the agent of the railroad company?
A. Yes, sir; because I wanted something on which I could get money.
Q. I understand you filled out every thing on those bills of lading in your own handwriting?
A. Yes, sir; and the clerk or some one in the office filled out some, perhaps.
Q. But they were all filled out in your office except the signature of the agent of the railroad company?
A. Yes, sir.
Q. And they were presented to the agent of the railroad company for signature?
A. Yes, sir.

Mr. Miller for the plaintiff now offers in evidence, the depositions of G. W. West and F. W. Offenhauser, taken under commission to show that the defendant company effected insurance on the cotton in question, therefore believing that it was responsible for the loss by fire, and effected insurance to cover its own liability.

51 Mr. Spencer for the defendant objects to the testimony sought to be elicited from the witness George W. West, and particularly the following interrogatories and the answers thereto, to wit: To the 3rd interrogatory, to the 5th interrogatory, to the 6th interrogatory, to the 7th and 8th interrogatories on the subject relating to insurance, taken out on the cotton in the name of the Texas & Pacific Railway Co., on the ground that the same is irrelevant and incompetent and neither proves or tends to prove any issue in the case.

Second. He objects upon the further ground, that the plaintiff in this case claims no benefit of said insurance, or any rights whatsoever under any policies that may have been issued thereon, in the name of and in behalf of said company, and the testimony concerning the same is therefore incompetent and irrelevant. And the further objection, that the testimony is not admissible under the pleadings.

Defendant further objects to the 2nd direct interrogatory upon the ground, that the bills of lading evidencing the contract between the plaintiff and the defendant are the best evidence of the facts inquired about. He objects to the 5th interrogatory upon the ground that the same is leading and suggestive; and he further objects to the evidence sought to be elicited thereunder upon the ground that the best evidence is the contract between the Union Compress Co. and this defendant.

He objects to the 7th interrogatory and the evidence sought to be elicited thereunder, on the ground that the contract between the Union Compress Co. and the defendant, and the policies of insurance which may have been effected, or procured, are the best evidence; that the testimony sought to be elicited, is incompetent. He objects to the 8th interrogatory on the ground that the policies of insurance are the best evidence. These are the objections noted to the interrogatories themselves.

Counsel for defendant also objects to the reading of the deposition of F. W. Offenhauser, and particularly the answers to the following interrogatories: To the 3rd interrogatory, to the 7th interrogatory, relating to insurance, or the policies held by the defendant company upon the same grounds as are urged to the testimony of George W. West, on the same subject.

All of the above objections of the defendant were overruled by the court; and thereupon Mr. Spencer for the defendant reserves exception.

And plaintiff rests his case.

52 D. E. GROVE, sworn for the defendant, says:

By Mr. SPENCER:

Q. You reside in Dallas, Texas?
A. I do.
Q. What is your business?
A. I am general agent for the Hartford Fire Insurance Co.
Q. Did the Hartford Fire Insurance Co. have any insurance in favor of the Texas & Pacific Railway Co. on cotton in the Union compress at Texarkana, Texas?
A. Yes, sir.
Q. I hand you a form of policy and ask you to state whether or not, that is the form of policy issued to the Texas & Pacific Railway Co. on cotton in the compress in Texarkana, Texas, on September 19th?
A. It is.

Mr. Spencer offers the form of policy testified to in connection with the testimony of this witness.

Q. Is this the usual form of policy issued in favor of common carriers of cotton?
A. It is.

Cross examined.

By Mr. MILLER:

Q. Through whom was the insurance effected, or obtained with your company, at Texarkana?
A. Through Mr. F. W. Offenhauser the agent of the company.
Q. That paper is evidence of the contract of insurance on the cotton that we are concerned in here?
A. That is what we term the policy form under which that was written.
Q. Is there any other document which constitutes the contract, except this paper; is this the entire contract of insurance?
A. No, sir; that is merely the form of the contract of insurance; it forms part of the policy.
Q. In other words, your company could not be sued on this paper alone—that is, it could be sued, but it would not be held liable, there would be something else necessary to constitute the contract?
A. I hardly think that is competent for a witness to answer.
Q. What I want to know is, whether this paper is the entire contract, or a part of the contract?
A. No, sir; it is in insurance parlance, a form that is pasted on the policy.
Q. The contract is made up on the standard policy?
A. Yes, sir.
Q. Which is the most essential part; this paper or the policy?
A. Well, apart, neither of them would mean anything—if I understand anything about it.

53 Q. Then this paper, by itself, means nothing?

A. Except as to the form under which the contract was made.

Q. The policy, which is not here, contains other stipulations, besides these found in this paper, which you offer now?

A. Yes, sir.

Q. Is it possible for any one to produce these policies?

A. I take it that it is possible, yes, sir; but that is merely my opinion; I do not know whether the policies are in existence, or not.

Q. This particular paper was not taken from any policy actually issued in this case?

A. No, sir; I think that was taken from the last report made to my office; that is presumed to be a copy of the policy.

Q. This then was a part of one of the policies actually issued in this case?

A. You mean that particular piece of paper?

Q. Yes.

A. No, sir; that is merely a copy of it.

Q. This is a copy of what you have been in the habit of pasting on the policies which you do issue?

A. Yes, sir; insuring common carrier liability.

Q. This applies to cotton on the compress platform—do you know where this cotton was when it was destroyed?

A. My information would all be second hand.

Q. Yes, you do not know anything about it, whether it was on the cars or the switches?

A. I do not, not from personal knowledge; I investigated the matter afterwards, but as a witness, I could not state it.

Mr. Spencer for the defendant offers in evidence the policy form, marked Def't I.

By Mr. SPENCER: This is a copy I understand of the form of your policy on this particular compress, at the time of this fire?

A. Yes, sir.

And defendant closes its case.

And the evidence having been closed, Mr. Spencer for the defendant, moves the court to direct a verdict in favor of the defendant.

54 NEW ORLEANS, LA., *May 20th*, 1901.

JOVITE CAU
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

The court met this day pursuant to adjournment. Present, his honor, Charles Parlange, judge, with a jury and all counsel of record present.

It is now understood and agreed between counsel, that the document marked Def't I, offered in evidence by the defendant, is to stand

in lieu of the policy of insurance inquired of by the witness D. E. Grove, examined on behalf of the defendant.

Mr. Miller, for the plaintiff, now submits four special instructions, which he moves the court may be given by the court to the jury.

The court refused to so instruct the jury, and marked the instructions so refused, as numbers one, two, three and four respectively.

Mr. Miller, for the plaintiff, excepts, and here reserves exception to the refusal of the court to instruct the jury, as by him requested.

And the court now granted the motion made by the counsel for defendant, and directed the jury to return a verdict in favor of the defendant.

And to such direction of the court to find a verdict for the defendant, Mr. Miller, on behalf of the plaintiff, reserves exception, and asks that all of the evidence adduced on the trial of the case before the jury be made a part of said exception. And it was so ordered.

Bill of Exceptions No. 2.

Filed June 15, 1901, *nunc pro tunc* as of May 20, 1901.

U. S. Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

Bill of exceptions No. 2.

Be it remembered, that upon the trial of this cause, before
55 the court and jury, the testimony and evidence set out, described and referred to in bill of exceptions No. 1, was offered by the respective parties and submitted to the jury upon the issues presented by the pleadings.

That thereupon, before the court charged or instructed the jury, counsel for plaintiff asked the court to direct or instruct the jury as follows, to-wit:

Instruction No. 1.

On behalf of plaintiff, the court is requested to instruct the jury as follows, to-wit:

A common carrier, such as defendant, cannot limit its common law liability as a carrier of goods, except with the consent of the shipper of goods; and where such consent is given, the agreement limiting the common law liability of the carrier cannot be sustained unless the carrier has given a consideration for it; this consideration must have been something else besides the mere contractual relations of the parties moving from the carrier to the shipper for the special contract; this usually, though not necessarily, is a reduced rate of transportation; but in order for such consideration to

be valid, it must appear that both rates of transportation were offered to the shipper and that they were reasonable, and that he had a genuine freedom of choice in making his selection; if you find from the evidence that there was no such freedom of choice offered the shipper, the contract is without consideration, and cannot be relied upon.

Therefore, if you find from the evidence that the plaintiff through his agent, inquired at Texarkana, Arkansas, of the agent of defendant, the rate of freight for its carriage of cotton from that point to New Orleans, Louisiana, and the said agent informed the agent of plaintiff what said rate was; and if you find further that the plaintiff's agent inquired if that was the only such rate of freight to be obtained from defendant for the transportation of cotton from Texarkana, Arkansas, to New Orleans, Louisiana, and in reply was informed by the agent of defendant that the rate given was the only rate of freight that could be obtained from defendant, and that the cotton of plaintiff was delivered to defendant, to be carried by defendant for such rate of freight, then I instruct you that there was no fair alternative or choice offered to plaintiff by defendant, as between two rates, under one of which defendant would be liable for the loss of the said cotton by fire, and under the other of which he would not be so liable; that in such case no freedom of choice
56 or option was allowed plaintiff in making a selection of which of the two such contracts he would make with defendant; that there was no real option between the two such forms of contract offered by defendant to plaintiff, and hence the clause or stipulation in said bills of lading exempting defendant from any liability from any loss of or damage to said cotton by fire, is not binding upon plaintiff, and you may deal with such bill of lading as though it did not contain such clause or stipulation.

Whereupon the court refused to instruct or charge the jury, as so requested; to which said action, ruling and refusal, plaintiff then and there, by his counsel, in the presence of the jury, while it was still at the bar and before it had retired, duly excepted; which said exception was then and there allowed by the court.

And now plaintiffs tenders this his bill of exceptions to the said ruling, to the court to sign and seal, and the court does sign and seal the same.

And now in furtherance of justice and that right may be done, the court allows the said exceptions and this bill of exceptions and signs and certifies the same.

Done in open court, this 15th day of June, 1901, *nunc pro tunc* as of May 20th, 1901, and I certify that this bill was duly and seasonably presented to me for signature.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Bill of Exceptions No. 3.

Filed June 15, 1901, as of May 20, 1901.

United States Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

Bill of exceptions No. 3.

Be it remembered, that upon the trial of this cause, before the court and jury, the testimony and evidence set out, described and referred to in bill of exceptions No. 1 was offered by the respective parties and submitted to the jury upon the issues presented by the pleadings.

That thereupon, before the court charged or instructed the
57 jury, counsel for plaintiff asked the court to direct or instruct the jury as follows, to-wit:

Instruction No. 2.

On the part of plaintiff, the court is requested to give the following instructions to the jury:

"If you find from the evidence that defendant issued a bill of lading to the plaintiff for the carriage of the one hundred and ten (110) bales of cotton, described in the petition in this case, from Texarkana, Arkansas, to New Orleans, Louisiana, and that said bill of lading contained a clause or stipulation exempting the defendant from any liability for the loss of or damage to said cotton by fire, you will inquire then whether or not such stipulation was fair, and reasonable; and in determining whether or not such stipulation was fair and reasonable, you may consider whether or not the same was forced upon the shipper, or whether he had a fair opportunity or alternative of shipping his property under a contract by which defendant would be liable for any loss or damage to said property, caused otherwise than by an act of God or the public enemy, for which he would pay a certain rate of freight, or of shipping his property under a contract which exempted the defendant from any liability for loss of or damage to said property by fire, for which he would pay a lower rate of freight than under a contract of carriage not containing such a condition or stipulation."

Whereupon the court refused to instruct or charge the jury, as so requested; to which said action, ruling and refusal, plaintiff then and there, by his counsel, in the presence of the jury, while it was still at the bar and before it had retired, duly excepted; which said exception was then and there allowed by the court.

And now plaintiff tenders this his bill of exceptions to the said

ruling to the court to sign and seal, and the court does sign and seal the same.

And now in furtherance of justice and that right may be done, the court allows the said exceptions and this bill of exceptions and signs and certifies the same.

Done in open court, this 15th day of June, 1901, *nunc pro tunc*, as of May 20, 1901, and I certify that this bill was duly and seasonably presented to me for signature.

(Signed) CHARLES PARLANGE,
U. S. Judge.

58 *Bill of Exceptions No. 4.*

Filed June 15, 1901, *nunc pro tunc* as of May 20, 1901.

U. S. Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY } No. 12923.

Bill of exceptions No. 4.

Be it remembered, that upon the trial of this cause, before the court and jury, the testimony and evidence set out, described and referred to in bill of exceptions No. 1, was offered by the respective parties and submitted to the jury upon the issues presented by the pleadings.

That thereupon, before the court charged or instructed the jury, counsel for plaintiff asked the court to direct or instruct the jury as follows, to-wit:

Instruction No. 3.

On behalf of plaintiff, the court is requested to give the following instructions to the jury, to-wit:

If you find from the evidence that the bills of lading under which the cotton of plaintiff was contracted to be carried by defendant from Texarkana, Arkansas, to New Orleans, Louisiana, contained a clause or stipulation exempting defendant from any loss of or damage to said cotton by fire, I charge you that you may consider whether or not that clause or condition was fair or reasonable or not.

The burden of proving the reasonableness of such clause or stipulation lies upon the defendant; it must prove by evidence that this clause or stipulation that plaintiff was offered by it, or had a fair opportunity or option to refuse or accept, was fair and reasonable.

Whereupon the court refused to instruct or charge the jury as so requested; to which said action, ruling and refusal, plaintiff then and there, by his counsel, in the presence of the jury, while it was still at the bar and before it had retired, duly excepted; which said exceptions was then and there allowed by the court.

And now plaintiffs tenders this his bill of exceptions to the said ruling, to the court to sign and seal, and the court does sign and seal the same.

59 And now in furtherance of justice that right may be done, the court allows the said exceptions and this bill of exceptions, and signs and certifies the same.

Done in open court, this 15th day of June, 1901, *nunc pro tunc*, as of May 20th, 1901, and I certify that this bill was duly presented to me within the time previously allowed by the court for presenting bills of exceptions in this cause.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Bill of Exceptions No. 5.

Filed June 15, 1901, *nunc pro tunc* as of May 20, 1901.

U. S. Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

Bill of exceptions No. 5.

Be it remembered, that upon the trial of this cause, before the court and jury, the testimony and evidence set out, described and referred to in bill of exceptions No. 1 (one) was offered by the respective parties and submitted to the jury upon the issues presented by the pleadings.

That thereupon, before the court charged or instructed the jury, counsel for plaintiff asked the court to direct or instruct the jury as follows, to-wit:

Instruction No. 4.

On behalf of plaintiff, the court is requested to instruct the jury as follows, to-wit:

In a contract limiting the common law liability of a carrier for loss of or damage to goods received by it for transportation, a consideration which supports that contract is presumed; but where, by the owner of the property a consideration is denied and evidence is produced by him going to show that there was no such consideration, the burden of proof is then upon the carrier to prove a good and valid consideration for such contract limiting his common law liability.

Therefore, I charge you, if you find that a clause or stipulation of a bill of lading under which defendant agreed to carry for plaintiff, from Texarkana, Arkansas, to New Orleans, Louisiana,

60 certain cotton, contained a clause or stipulation exempting defendant from any liability for the loss of or damage to

said cotton by fire, and if you find that plaintiff has denied having received any consideration for his consent or agreement to such limitation of defendant's liability, and evidence has been offered by plaintiff in support of this denial of such consideration, I instruct you that the presumption that such agreement is supported by a consideration has been overcome and that the burden is then upon the defendant to prove by evidence that such consideration existed; should defendant not administer proof sufficient to convince you that a consideration for such agreement was given by it, notwithstanding the denial of plaintiff that no such consideration was given and the evidence placed before you in support of said denial, then I charge you that you may find that there was no consideration for such agreement, limiting the liability of defendant, and the said clause or stipulation of said bill of lading, if there be any so limiting defendant's liability, is not binding upon plaintiff and cannot be enforced against him.

Whereupon the court refused to instruct or charge the jury, as requested; to which said action, ruling and refusal, plaintiff then and there, by his counsel, in the presence of the jury, while it was still at the bar, and before it had retired, duly excepted; which said exception was then and there allowed by the court.

And now plaintiff tenders this his bill of exceptions to the said ruling, to the court to sign and seal, and the court does sign and seal the same.

And in furtherance of justice and that right may be done, the court allows the said exceptions and this bill of exceptions, and signs and certifies the same.

Done in open court, this 15th day of June, 1901, *nunc pro tunc*, as of May 20th, 1901, and I certify that this bill was duly and seasonably presented to me for signature.

(Signed) CHARLES PARLANGE,
U. S. Judge.

61 *Motion for Writ of Error.*

Filed June 15, 1901.

United States Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12923.

And now comes the plaintiff, Jovite Cau, by Branch K. Miller, his attorney in the above entitled and numbered cause, and on suggesting to the court that said plaintiff conceives and believes himself to be aggrieved by, and that there is error to his prejudice in the final judgment of this court herein rendered on May 17th, 1901, and that plaintiff desires to remove or carry the said final judgment by writ

of error to the United States circuit court of appeals for the fifth circuit, to the end that the said final judgment may, by said circuit court of appeals, be examined and reviewed, to the end that the error in said final judgment contained may be corrected.

It is ordered in open court that the plaintiff, Jovite Cau, be allowed a writ of error, to have reviewed in and by the United States circuit court of appeals for the fifth circut the final judgment entered in this cause, and that the amount of bond on said writ of error be, and is, hereby fixed at two hundred and fifty dollars.

It is further ordered that the said writ of error be returned to the said United States circuit court of appeals for the fifth circuit, within thirty days from the granting of this motion.

New Orleans, La., June 15, 1901.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Assignment of Errors.

Filed June 15, 1901.

United States Circuit Court, Eastern District of Louisiana.

JOVITE CAU
vs.
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62 Assignment of errors.

And now, on this the 15th day of June, comes the plaintiff, Jovite Cau, by Branch K. Miller, Esquire, his attorney, and in connection with his motion for a writ of error herein, says that the final judgment of the verdict of the jury is erroneous, and assigns the following as errors in the same and for which the same should be reversed:

First. That the court erred in refusing the request of plaintiff for a direction or instruction to the jury to find upon the whole of the evidence offered by both the plaintiff and defendant and submitted to the jury to find a verdict for plaintiff, that in refusing to give such direction or instruction to the jury, the court was in error.

Second. That the court erred in withdrawing cause from the consideration of the jury, and directing it, the jury, to find a verdict for defendant; that upon the whole of the evidence offered and submitted to the jury by both plaintiff and defendant the said instruction or direction of the court to the jury was not justified, and was in error.

Third. That the court erred in refusing to allow the submission to the jury of the question, whether or not upon the whole of the evidence offered before and submitted to the jury by both plaintiff and defendant, the destruction of plaintiff's cotton in the petition, was not due or caused by the negligence of the defendant.

Fourth. That upon the whole of the evidence offered by both

plaintiff and defendant, and submitted to the jury, it was clearly shown that the destruction of the cotton of the plaintiff described in the petition, was due to and caused by the negligence of the defendant, from which the law does not permit the defendant to stipulate for the liability for which, neither the law or public policy permits or will permit the defendant to stipulate for its non-liabilities; that the whole evidence, offered by both plaintiff and defendant, and submitted to the jury herein upon the trial of said cause, and upon which their verdict is to be found, it clearly appeared that the loss and destruction by fire of defendant's cotton described in the petition, was due and caused by, solely, the negligence of the defendant; and that it was liable for the loss and destruction of plaintiff's said cotton, stipulated in the bill of lading herein, exempting the defendant from any liability for loss or damage to said cotton by fire, to the contrary notwithstanding; and the circuit court in not so
63 holding, and so directing and instructing the jury, committed manifest and grievous error to the prejudice of plaintiff.

And the said court committed grievous and manifest error in directing and instructing the jury as aforesaid, upon the whole of the evidence offered by both plaintiff and defendant, this constituted all of the evidence before the jury, to find a verdict for the defendant.

Fifth. That the court erred in refusing to give to the jury as requested by plaintiff the directions or instructions Nos. 1, 2, 3 and 4, embodied and set out at length in bills of exceptions Nos. 1, 2, 3, 4 and 5.

Wherefore, plaintiff, in the circuit court, and plaintiff in error upon the writ of error prayed for and allowed in this cause, prays that the judgment of the circuit court herein be reversed, and that such direction be given that full force and efficacy *and* enure the plaintiff by reason of the cause of action stated in his petition, and the evidence offered and submitted to the jury upon the trial of this cause, in the said circuit court, and for general relief.

(Signed) BRANCH K. MILLER,
Attorney for Plaintiff.

Bond.

Filed June 15, 1901.

United States Circuit Court, Eastern District of Louisiana.

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Know all men by these presents, that we, Jovite Cau, as principal, and Frank Emmett, as surety, are held and firmly bound unto the Texas & Pacific Railway Company in the full and just sum of two hundred and fifty dollars, to be paid to the said Texas & Pacific Railway Company, certain attorney, executors, administrators or

assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of June, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a session of the United States circuit court, fifth judicial circuit, holding sessions in and for the eastern
64 district of Louisiana, in a suit depending in said court, between the said Jovite Cau as plaintiff and the said Texas & Pacific Railway Company as defendant, a judgment was rendered against the said Jovite Cau and the said Jovite Cau having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Texas & Pacific Railway Company, citing and admonishing — to be and appear before the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Jovite Cau shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make — plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOVITE CAU,
Per V. W. PONS. [SEAL.]
(Signed) FRANK EMMETT. [SEAL.]

Approved by:
(Signed) CHARLES PARLANGE,
U. S. Judge.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Jovite Cau and The Texas & Pacific Railway Company, in suit No. 12,923 of the docket of said court, a manifest error hath happened, to the great damage of said Jovite Cau, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States circuit court of appeals, to
65 be then and there held, and the record and proceedings aforesaid being inspected, the said United States circuit court of

appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15 day of June, in the year of our Lord one thousand nine hundred and one.

[SEAL.] E. R. HUNT,
Clerk of the U. S. Circuit Court, Eastern District of Louisiana.

Allowed by:
CHARLES PARLANGE, *U. S. Judge.*

(Indorsed:) No. 12,923. Jovite Cau *vs.* The Texas and Pacific Railway Company. Writ of error. No. — U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed 15 June, 1901. E. R. Hunt, clerk.

Reasons of the Court for Refusing New Trial.

Filed June 10, 1901.

U. S. Circuit Court, Eastern Dist. La.

JOVITE CAU *vs.* T. & P. R. R. } No. 12923.

Reasons of the court for refusing a new trial.

PARLANGE, *District Judge:*

The sole question in this cause is whether the clause in the bill of lading exempting the carrier from liability for loss by fire is binding on the plaintiff. No negligence is charged against the carrier

The shipment was made by the plaintiff's agent, an intelligent and experienced buyer and shipper of cotton. He is presumed to have known the law and to have been aware that the carrier, if he so desired, was compelled to take the freight under its common law liability, without the "fire clause." Furthermore, it was proven that prior to the shipment, plaintiff's agent called for blank bills of lading, took them to his office and in his own time, filled
66 them and then presented them for signature by the carrier.

This fact, together with the general knowledge which the plaintiff's agent must have had from his previous experience in shipping cotton, makes it certain that as matter of fact, the plaintiff's agent knew of and assented to the "fire clause." Shippers have been held bound by the "fire clause" in a bill of lading even when they claimed that they did not know that the clause was in the bill of lading, provided they were afforded a full and fair opportunity to acquaint themselves with the contents of the bill of lading. Failure to read the bill of lading has been held, under such circum-

stances, not to avail the shipper. But of course, the present cause is one in which as matter of fact, the shipper knew or must be held to have known, that the bill of lading contained the "fire clause." I am clear that there is nothing in the evidence which would invalidate the bill of lading for duress, concealment, fraud or misrepresentation by the carrier.

The case of York Co. *vs.* Central R. R., 3 Wall. 107, was a stronger case against the carrier than the present case. It turned like the present case, upon the acceptance of the bill of lading by the shipper, but it was complicated by the fact that the shipper had not examined the bill and had no authority from his principal to agree to the "fire clause." Yet, the Supreme Court held that the "fire clause" was valid.

That in the present case the "fire clause" is binding on the shipper, I consider to be clear.

See: York Co. *vs.* Central R. R., *supra.*
Platt *vs.* Richmond &c. R. R., 108 N. Y. 358.
Germania &c. Co. *vs.* M. &c. R. R., 72 N. Y. 90.
Nelson *vs.* H. &c. R. R., 48 N. Y. 498.
Hutchinson on Carriers, 2nd ed'n, sec. 278, specially latter part thereof.

In the same work, sec. 240, it is said: "Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be wilfully blind and plead ignorance when it was his duty to know; and knowing in such cases is assenting. If it was his intention to hold the carrier to his common law liability,
67 he should have said so, and have either declined to employ him or sued him for his refusal, after tendering a reasonable sum for his services and risk." See cases there cited.

See same work as to limitation of carrier's liability by contract sec. 225, *et seq.*

Limitation of liability contained in a bill of lading accepted by shipper is binding upon him. Wood on R. R., Minor's edition of 1894, vol. 3, sec. 425, pp. 1881, 1882, and cases there cited.

In the U. S. the rule is generally recognized that acceptance by the shipper of a bill of lading containing a limitation of the carrier's liability is binding on the shipper when the limitation is not illegal or unreasonable; and the shipper is conclusively presumed to have read and assented to the provisions of the bill of lading. See Am. and Eng. Enc. Law (2nd edition), Verbis "Carriers of Goods," vol. 5, pp. 293 and 294, and cases there cited.

A further citation of authorities on the point is deemed useless.

Of course, it is clear that on the question of a carrier's liability

the Federal courts follow their own jurisprudence. Authorities need not be cited on this point.

The motion for a new trial must be refused.

(Signed) CHAS. P., *J.*

68 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing 69 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had together with all the evidence adduced on the trial of the case of Jovite Cau *versus* Texas and Pacific Railway Company, No. 12,923 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 12 day of July, A. D. 1901.

E. R. HUNT, *Clerk*,

[SEAL.] By H. J. CARTER,
Deputy Clerk.

I, —— ——, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this — day of ——, A. D. 18—.

—— ——, *Judge.*

69 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

DECEMBER 11, 1901.

(Extract from Minutes.)

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1081.

This cause was regularly called this day and submitted to the court after argument by Mr. Branch K. Miller for plaintiff in error, and by Mr. N. W. Finley for defendant in error.

November Term, 1901.

JANUARY 7, 1902.

(Extract from Minutes.)

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1081.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered, and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiff in error Jovite Cau, and the surety on the writ of error bond herein Frank Emmett, be condemned *in solido*, to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

January 7, 1902.

70 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

JOVITE CAU, Plaintiff in Error,
versus
TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 1081.

Petition for Rehearing.

Now comes Jovite Cau, plaintiff in error, by his attorney Branch K. Miller, and petitions this honorable court for a rehearing in the above entitled cause for the following reasons and upon the grounds following, to-wit:

First. That the court erred in holding that the contract or clause in the bill of lading in question herein exempting the defendant carrier from any liability for loss or damage caused by fire to the cotton received by it, was binding upon the plaintiff in error; that such a contract or clause is valid and binding only when just and reasonable; that the burden of showing that the said contract or clause was just and reasonable was upon the defendant in error; that said burden of proof was not discharged by defendant in error; that no attempt was made by it to prove or show that said contract or clause was just and reasonable; that no evidence was offered nor any showing made by defendant in error to establish that plaintiff in error at the time of the shipment of the cotton and the receipt of the bill

U. S. circuit court of appeals, filed Jan 27 1902 Charles H. Lednum clerk.

71 of lading herein, was offered, or given an opportun-ty to choose, whether or not he would ship his cotton under the common law liability of the defendant in error as a carrier, or its restricted liability as attempted by said clause in its bill of lading purporting to exempt it from loss or damage to plaintiff in error's cotton caused by fire; that it does not appear, nor is it a fact, that plaintiff in error was allowed any option or choice between the two kinds of contracts of carriage which he could make, one under which the defendant in error would be liable to him as a carrier as at common law, or one under which the defendant in error's common law liability would be modified, diminished or lessened as attempted by said clause in said bill of lading.

Second. That before said clause in said bill of lading would be held as binding upon plaintiff in error, it was a necessary pre-requisite for defendant in error to show that there was a consideration sufficient to support the said exemption clause in the said bill of lading. That the said clause in the said bill of lading attempting to exempt defendant in error from liability for any loss or damage caused to said cotton by fire, did not and can not bind plaintiff in error, until the same was proven or shown by defendant in error to be just and reasonable.

Third. That said exemption clause did not and can not bind plaintiff in error in the absence of a clear showing that plaintiff in error was allowed a genuine option of choice, of the alternative of shipping his cotton at the risk of defendant in error, as under the common law, or under its restricted liability as attempted by said exemption clause in said bill of lading, attempting to exempt it from any loss or damage to said cotton caused by fire.

Wherefore, petitioner prays that the judgment of the court herein be vacated and set aside, and that a rehearing be granted plaintiff in error and for general relief.

BRANCH K. MILLER,
Att'y for Plaintiff in Error.

I hereby certify that in my opinion the foregoing petition is well founded in point of law.

BRANCH K. MILLER.

72 November Term, 1901.

FEBRUARY 11, 1902.

(Extract from Minutes.)

JOVITE CAU
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1081.

Ordered, that the petition for rehearing filed in this cause, be, and the same is hereby denied.

73 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

(Filed January 7, 1902. Charles H. Lednum, Clerk.)

JOVITE CAU, Plaintiff in Error,
vs.
TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 1081.

Error to the circuit court of the United States for the eastern district of Louisiana.

Before Pardee, McCormick, and Shelby, circuit judges.

By the COURT: This was an action by the plaintiff in error, to recover the value of certain cotton delivered to the defendant in error, to be transported from Texarkana, Texas, to the port of New Orleans, Louisiana at an agreed charge for freight of sixty cents per hundred pounds. The petition alleged that, in evidence of the contract, the company delivered to the plaintiff in error, its certain bills of lading; that while the bales of cotton were awaiting further shipment, but after they had been received by the railroad company as a common carrier and were in its possession as such and after it had issued its bills of lading to carry the same, the whole of the cotton was destroyed by fire. The petition alleged further that by the third clause of the bills of lading the railway company attempted to limit its liability as a common carrier, declaring that it should not be liable for any damage to or destruction of the cotton caused by fire; that this clause is wholly inoperative, null and void against the petitioner, on the follow-
74 ing grounds: (1) that plaintiff did not receive any consideration from the railway company for such limitation of its common-law liability; (2) that the destruction of the cotton by fire was due to, and caused by the negligence of the company, its agents and servants; (3) that the cotton was received by the railway company prior to the issuance of the bills of lading, and it was without authority after the receipt of the cotton as a carrier to limit its liability under the common law. The answer, besides the general issue, set up specially the terms of the third clause of the bills of lading, which so far as necessary to recite expressed "that neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damage to or destruction of said cotton by fire." The case came on for trial, and the evidence having been closed counsel for the defendant moved the court to direct a verdict in favor of the defendant, which motion was granted, and the jury, under the direction of the judge returned their verdict, "We the jury find a verdict in favor of the defendant;" upon which judgment was duly entered. In acting on the plaintiff's motion for a new trial the learned judge of the circuit court said:

"The sole question in this cause is whether the clause in the bill of lading exempting the carrier from liability for loss by fire is

binding on the plaintiff. No negligence is charged against the carrier. The shipment was made by the plaintiff's agent, an intelligent and experienced buyer and shipper of cotton. He is presumed to have known the law and to have been aware that the carrier, if he so desired, was compelled to take the freight under its common law liability, without the fire clause. Furthermore, it was proved that prior to the shipment plaintiff's agent called for blank bills of lading, took them to his office and in his own time filled them, and then presented them for signature by the carrier. This fact, together with the general knowledge which the plaintiff's agent must
75 have had from his previous experience in shipping cotton, makes it certain that as matter of fact the plaintiff's agent knew of and assented to the fire clause. Shippers have been held bound by the fire clause in a bill of lading even when they claimed that they did not know that the clause was in the bill of lading, provided they were offered a full and fair opportunity to acquaint themselves with the contents of the bill of lading. Failure to read the bill of lading has been held under such circumstances, not to avail the shipper. But, of course, the present clause is one in which as matter of fact the shipper knew or must be held to have known that the bill of lading contained the fire clause. I am clear that there is nothing in the evidence which would invalidate the bill of lading for duress, concealment, fraud or misrepresentation by the carrier."

So far as it affects this case the statement of the law embraced in the foregoing extract from the trial judge's opinion is fully supported by the leading case of York Company *v.* Central Railroad, 70 U. S., 107, which has been cited with approval by the Supreme Court as late as the case of Queen of the Pacific, 180 U. S. 49.

We have carefully examined the record submitted to us on this hearing, and concur in the view taken by the trial judge that there is nothing in the evidence which would invalidate the bills of lading for duress, concealment, fraud or misrepresentation by the carrier.

The judgment of the circuit court is therefore affirmed.

76 United States Circuit Court of Appeals, Fifth Circuit.

JOVITE CAU
v.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1081.

Assignments of Error.

The plaintiff in this action in connection with his petition for writ of error, makes the following assignments of error, which he avers occurred on the trial and hearing of this cause in this court:

First. That this court erred in finding that there was no error in the refusal of the circuit court of the request of plaintiff for a direction or instruction to the jury, to find upon the whole of the evidence offered by both plaintiff and defendant and submitted to the jury, to find a verdict for plaintiff; that the circuit court of

appeals should have held that there was error in the said refusal of the circuit court.

Second. That this court erred in finding that there was no error in the circuit court in its direction or instruction to the jury to find a verdict for the defendant; that upon the whole of the evidence offered and submitted to the jury, by both plaintiff and defendant, the said direction or instruction of the circuit court to the jury was error; and the circuit court of appeals committed error in not finding that there was error in the direction or instruction of the circuit court to the jury to find a verdict for the defendant.

Third. That the circuit court of appeals erred in finding that there was no error in the refusal of the circuit court to allow the submission to the jury of the question, whether or not, upon the whole of the evidence offered and submitted to the jury, by both plaintiff and defendant, the destruction of plaintiff's cotton as stated in his petition, was not due to, or caused by the negligence of the defendant; that the circuit court of appeals should have reversed the judgment of the circuit court upon the ground, that the question, whether
77 or not, the destruction of plaintiff's said cotton by fire, was due to or caused by defendant's negligence, should have been submitted to the jury in the circuit court, and the circuit court erred in refusing to submit or allow such question to go to the jury.

Fourth. That upon the whole of the evidence offered by both plaintiff and defendant, and submitted to the jury, it was clearly shown that the destruction of the cotton of the plaintiff described in the petition was due to and caused by the negligence of the defendant from which the law does not permit the defendant to stipulate for the liability for which, ne-ther the law or public policy permits or will permit the defendant to stipulate for its non-liabilities; that — the whole evidence, offered by both plaintiff and defendant, and submitted to the jury herein upon the trial of said cause, and upon which their verdict is to be found, it clearly appeared that the loss and destruction by fire of plaintiff's cotton described in the petition was due and caused by, solely, the negligence of the defendant: and that it was liable for the loss and destruction of plaintiff's cotton, stipulated in the bill of lading herein, exempting the defendant from any liability for loss or damage to said cotton by fire, to the contrary notwithstanding; and the circuit court in not so holding, and so directing and instructing the jury committed manifest and grievous error to the prejudice of plaintiff.

And the said court committed grievous and manifest error in directing and instructing the jury as aforesaid, upon the whole of the evidence offered by both plaintiff and defendant, this constituted all the evidence before the jury, to find a verdict for the defendant.

That the circuit court of appeals committed error to the prejudice of plaintiff in not finding upon the grounds hereinbefore set out in the four assignments of error, that the circuit court committed error to the grievous injury of plaintiff, and upon the grounds and reasons set out in these four assignments of error, should have reversed the judgment of the circuit court.

Fifth. That the circuit court of appeals erred in finding that there was no error in the refusal of the circuit court to give to the jury, as requested, by plaintiff, the directions or instructions
78 numbers 1, 2, 3, and 4, embodied and set out at length in plaintiff's bills of exception, numbers 1, 2, 3, and 4.

Wherefore, plaintiff in the circuit court and plaintiff in error in the circuit court of appeals, prays that the judgment of the said circuit court of appeals for the fifth circuit in this case be reversed, and that such direction be given that full force and efficacy shall and may enure the plaintiff by reason of the cause of action stated in his petition, and the evidence offered and submitted to the jury upon the trial of this cause in the circuit court, and which by the record of the writ of error herein was brought before and submitted to the circuit court of appeals for the fifth circuit.

BRANCH K. MILLER,
W. S. PARKERSON,
Attorneys for Petitioner.

Endorsed: Filed May 3, 1902. Assignment of errors. Charles H. Lednum, clerk.

79 In the United States Circuit Court of Appeals, Fifth Circuit.

JOVITE CAU
v.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1081.

To the Honorable Edward D. White, associate justice of the Supreme Court of the United States:

The petition of Jovite Cau, plaintiff in the above entitled and numbered cause in the circuit court, and plaintiff in error in the same case in this court, respectfully shows:

That the jurisdiction of the circuit court herein did not depend solely upon diverse citizenship, but that the defendant corporation is created, or chartered by an act of Congress.

That your petitioner deems himself aggrieved by the decree of this court, made and entered in the above entitled and numbered cause, on January 7th, 1902, and that there is error to his prejudice in the said judgment of this court.

That petitioner desires to remove, or to carry the said final judgment, by writ of error to the Supreme Court of the United States, to the end that the said judgment of this honorable court may be examined and reviewed, and the errors in the said judgment, which are set out in the assignment of errors filed herewith by petitioner, may be corrected.

Wherefore, petitioner prays that he be allowed a writ of error in this cause to have reviewed by the Supreme Court of the United

States the final judgment entered by this court in this cause, and that the amount of bond of said writ of error be fixed by this court, the whole according to law, and for general relief.

BRANCH K. MILLER,
W. S. PARKERSON,
Attorneys for Petitioners.

Endorsed: Petition for writ of error. Filed May 3, 1902. Charles H. Lednum, clerk.

80 *Order.*

The writ of error prayed for in the foregoing petition is hereby allowed; plaintiff in error to furnish a bond for said writ of error in the sum of five hundred dollars, according to law.

Washington, D. C., May 5th, 1902.

(Signed) EDWARD D. WHITE,
Associate Justice.

Endorsed: Order allowing writ of error. Filed May 7, 1902. Charles H. Lednum, clerk.

81 Know all men by these presents, that we Jovite Cau as principal and Valentine William Pons as surety, are held and firmly bound unto The Texas & Pacific Railway Company in the full and just sum of five hundred dollars, to be paid to the said Texas & Pacific Railway Company, certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves our heirs, executors and administrators, jointly and severally by these presents.

Sealed with ou- seals and dated this — day of —— in the year of our Lord —.

Whereas lately at a session of the United States circuit court of appeals for the fifth circuit holding sessions in and for the eastern district of Louisiana in a suit depending in said court between the said Jovite Cau plaintiff in error, and the said Texas & Pacific Railway Company, defendant in error a judgment was rendered against the said Jovite Cau and the said Jovite Cau having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Texas & Pacific Railway Company citing and admonishing it to be and appear before the Supreme Court of the United States to be holden at Washington, District of Columbia, within 30 days from the date thereof.

Now the condition of the above obligation is such. That if the said Jovite Cau shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force and virtue.

JOVITE CAU. [SEAL.]
VALENTINE WILLIAM PONS. [SEAL.]

Sealed and delivered in the presence of

—— ——.

Approved by
EDWARD D. WHITE,
Associate Justice Supreme Court of the United States.

May 5th, 1902.

82 UNITED STATES OF AMERICA, }
Eastern District of Louisiana. }

Personally appeared Valentine William Pons who being duly sworn, deposes and says that he is the surety on the within bond, that he resides in the city of New Orleans, Louisiana and is worth the full sum of five hundred dollars ($500.00), over and above all his debts and liabilities and property exempt from execution.

VALENTINE WILLIAM PONS.

Subscribed and sworn before me this 2nd day of May, 1902.
W. F. BREWER, *Not. Pub.*

Endorsed: Filed May 7, 1902. Bond. Charles H. Lednum, clerk.

83 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to the Texas & Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, within 30 days from date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of appeals of the United States for the fifth circuit wherein Jovite Cau is plaintiff in error, and you The Texas & Pacific Railway, is defendant in error to show cause, if any there be, why the judgment rendered against the said Jovite Cau as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of May in the year of our Lord one thousand nine hundred and two.

EDWARD D. WHITE,
Associate Justice.

Service of this citation is hereby accepted.

HOWE, SPENCER & COCKE,
Att'ys — Def't in Error.

[Endorsed:] United States circuit court. Eastern district of Louisiana. No. —. Jovite Cau *vs.* T. & P. R'w'y. Citation of appeal. Filed May 7, 1902 Charles H. Lednum clerk of the United States circuit court of appeals.

84 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of appeals — the United States for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Jovite Cau plaintiff in error, and The Texas & Pacific Railway Company, defendant in error a manifest error hath happened, to the great damage of the said Jovite Cau, plaintiff in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of United States, together with this writ, so that you have the same at Washington, District of Columbia, within 30 days from the date hereof, in the said Supreme Court of the United States, to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal United States Circuit Court of Appeals, Fifth Circuit.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of May in the year of our Lord 1902.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

Allowed by—
EDWARD D. WHITE,
Associate Justice.
May 5th, 1902.

[Endorsed:] No. 1081. Jovite Cau *vs.* Texas & Pacific Railway Company Writ of error. Filed May 7, 1902 Charles H. Lednum clerk of the United States circuit court of appeals.

85 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 85 pages, numbered from *a* to 84, inclusive, contain a true copy of the record, bill of exceptions, assignment of errors, and all the proceedings had except that the original writ of error and citation in error are included therein instead of copies thereof in the case of Jovite Cau, plaintiff in error, *versus* Texas & Pacific Railway Company, defendant in error, No. 1081, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, Louisiana, this 15th day of May A. D. 1902.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No. 18,544. U. S. C. C. of appeals, 5th circuit. Term No. 57. Jovite Cau, plaintiff in error, *vs.* The Texas & Pacific Railway Company. Filed May 26", 1902.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 57.

JOVITE CAU, PLAINTIFF IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

B. K. MILLER,
W. S. PARKERSON,
Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10290

(18,544)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 57.

JOVITE CAU, PLAINTIFF IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a suit for fifty-seven hundred and fifty-four and $\frac{93}{100}$ ($5,754.93) dollars, the value of one hundred and ten (110) bales of cotton delivered to the Texas and Pacific Railway Company by Jovite Cau at Texarkana, Texas, for carriage from that place to the city of New Orleans, Louisiana.

The suit was first instituted in the civil district court for the parish of Orleans, State of Louisiana, but subsequently removed to the circuit court of the United States for the eastern district of Louisiana, fifth circuit, on the application of the defendant in error, on the ground that it was a corporation created by and organized under certain acts of Congress (R., p. 5).

In the circuit court the defendant in error first pleaded the general issue, and afterwards, under the reserve of this plea, set up that the cotton was received by it to be transported under bills of lading, evidencing the written contracts between plaintiff and defendant; that these bills of lading were in the possession of the plaintiff, and defendant asked that they be made part of its answer as if fully set out at length; that the cotton was destroyed at Texarkana, Texas, as alleged in the petition; that said bills of lading contained the express stipulation, among others, that the defendant should not be liable for the loss of or damage to the said cotton by fire, and defendant expressly claimed and pleaded the benefit of this exemption. The answer further set out that plaintiff had no real or substantial interest in the subject-matter of the suit, as prior to the institution thereof he had parted with all right, title, and interest in and to any claim he might have against defendant, growing out of the loss or damage to the said cotton, to certain insurance company or companies, the names of which were unknown to defendant, but which would be proven on the trial of the case; that if plaintiff had any right or cause of action it no longer belonged to or vested in him at the institution of the suit (R., pp. 9 and 10).

Subsequently, on the trial of the case, there was a verdict and judgment in favor of the defendant (R., pp. 11, 14).

During the trial of the case bills of exception were taken to the rulings and instructions of the circuit judge, all of which are set out in the numbers 1, 2, 3, 4, and 5 (R., pp. 14, 49, 51, 52, and 53).

The first bill of exception was to the action of the circuit court in instructing or directing the jury, upon the whole of

the testimony and evidence heard upon the trial of the case, to find a verdict for the defendant (R., pp. 14–16).

The whole of the evidence offered by both plaintiff and defendant was annexed to and made part of bill of exception No. 1. This evidence included the bills of lading for the cotton in question, issued by defendant to plaintiff at Texarkana, Texas. the third paragraph of which (R., pp. 19, 25, 26, 27) contained the following stipulation, to wit:

"That neither the Texas and Pacific Railway Company, nor any connecting carrier handling said cotton, shall be liable for damage to, or destruction of said cotton by fire * * *" (R., p. 19).

The defendant had insured itself against any loss of or damage to the cotton by fire while it was in its possession as a carrier; and it appears from the evidence that the 110 bales of cotton in question here were destroyed by fire while it was in the hands of the Union Compress Company at Texarkana, Texas, for account of the Texas and Pacific Railway Company. This is shown by the testimony of G. W. West, taken under commission and made part of bill of exception No. 1 (R., p. 29).

The witness says that he was the superintendent of the Union Compress Company at Texarkana; that he knew of the 110 bales of cotton, the subject of this suit; that he was manager of the compress at the time and had received and receipted for the same; that this cotton was totally destroyed by fire at a time when same was covered by insurance obtained by the compress company to protect the transportation companies against loss by fire on all cotton for which they had signed bills of lading and until the cotton was

loaded back into the cars. This would include the 110 bales of cotton for the value of which defendant is here sued. The witness says further that the railroad companies were notified each day of the number of bales of cotton in the possession of the compress for the railroad company's account; the compress company at the time had receipts from the railroad company covering the above cotton; the policies were delivered to the agent of the Texas and Pacific Railway Company, and that this procedure was strictly followed in the instant case (R., pp. 29, 30).

On cross-examination the witness repeats that he knew the cotton was in the care of the compress company at the time of destruction by fire, and that it was insured in favor of the defendant. These policies were turned over to the agent of the railroad company.

F. W. Offenhauser, whose testimony was taken under commission and was attached as part thereof to bill of exception No. 1, says that the fire occurred September 19, 1900, and that the cotton burned was all covered by insurance; that the course of dealing with the Union Compress Co., as to insurance against loss of or damage to cotton by fire while in the possession or custody, after bills of lading for same had been issued, was to effect insurance for the benefit and in the name of each particular railroad company for which it was compressing cotton; that this rule applied to all cotton coming into the possession of the compress company for account of the railroad companies; that while he knows nothing as to the particular 110 bales of cotton in question, he does say that about 1,500 bales of cotton belonging to various parties were destroyed by the fire of September 19, 1900, and that it was all covered by insurance, and that it was the

custom of the compress company to protect railroad companies as above stated. The policies in all cases of the Texas and Pacific Railway Company were delivered to the agent of the company at Texarkana.

On cross-examination he says that, as the agent of the insurance company, he caused the policies to be issued and delivered to the Texas and Pacific Railway Company at Texarkana (R., p. 31).

And he adds that the policies for the insurance mentioned by him were delivered to the agent of the Texas and Pacific Railway Company at Texarkana (R., p. 32).

An extract from the policy shows that the insurance was—

"on cotton in bales, for which bills of lading had been issued and for which they shall be legally liable for loss or damage, by fire, while contained on compress platform and in cars on switches adjacent thereto situate" (R., p. 32).

An examination of the bills of lading themselves would show that the first was issued September 15, 1900 (R., p. 21); the second, September 17, 1900 (R., p. 26), and the third, September 17, 1900 (R., p. 28), all two days previous to the fire, which was on September 19, 1900.

The testimony of V. W. Pons, which was annexed to bill of exception No. 1 as part thereof, shows that neither Mr. Cau, who was not present in Texarkana at the time the transaction spoken of occurred, nor the witness himself, who was there and acted as Mr. Cau's agent, ever obtained any policies of insurance on the cotton, nor had the plaintiff made any claim against any insurance company on account of this loss (R., pp. 34, 35).

On the merits Mr. Pons testified that he was Mr. Cad's cotton buyer at Texarkana in September, 1900; that he personally bought the one hundred and ten bales in question here for the purpose of shipping it first to New Orleans and then to Europe; that he delivered it to the defendant as a common carrier for the purpose of having it brought from Texarkana to New Orleans (R., p. 35); that when he obtained the bills of lading for the cotton he was not given any option as to the rate of freight he should pay for bringing the cotton from Texarkana to New Orleans; that when he went to the agent of the Texas and Pacific Railway Company he was told that he could get but one rate—sixty cents per hundred—and that was the rate of the other roads; that he sought the defendant simply to get the rate and gave them the cotton at the rate which was named to him. He repeats that the agent of the defendant at Texarkana, to whom he applied for information, told him that there was but one rate which he could get; that he knew that the tariff of all roads was the same, and this was the result of his application to each one of them for information (R., pp. 36, 37).

That the tariff which was offered in evidence (and found on page 17 of the record) was obtained by the witness from the Kansas City and Southern Railroad Company, which was the only carrier which so furnished him with one; that he applied to all the roads to get the rates to New Orleans and he could get no cheaper rate.

The printed circular or tariff so offered in evidence by the defendant purports to have been issued by the Texas and Pacific Railway Company, with other companies, and is styled "Joint freight tariff applying on cotton and cotton

linters, in bales any quantity, from Texarkana, Texas, to points named below; issued September 4th, 1900; effective September 17th, 1900," and one of the points named below is "New Orleans (depot delivery), La., sixty cents;" "New Orleans (shipside delivery), La., sixty-three cents." By a note at the bottom of this circular it is declared "No contract will be made, or bill of lading issued for 'New Orleans shipside delivery'" (R., p. 17).

One or more of the bills of lading in question here, containing the exemption clause, was made out in advance by the plaintiff, and the other or others by the defendant (R., pp. 39, 42). It seems, however, that the bills of lading, from which plaintiff's clerk made out one or more, had already been received from the defendant, at Texarkana, Texas, and this in response to plaintiff's request to be furnished with bills of lading for cotton to be shipped to New Orleans; it seems when the plaintiff received these it was in response to a request for bills of lading to New Orleans; defendant's agent informed plaintiff's clerk at the same time that he had but one form of bill of lading, and that is what he furnished the plaintiff; that Pons, plaintiff's agent, asked the company's agent for a form of bill of lading to New Orleans, and he got those in question, among others, the one or more which he, Pons, had already filled up, except the signature, for one or more of the shipments in question here; he afterwards applied to the company for other bills of lading, and the agent answered him as before, when asked, and the agent at the time declared that the bills of lading furnished were of the same form as those already furnished (R., pp. 42, 43, and 44).

Plaintiff's agent states specially that he asked what was the rate to carry cotton to New Orleans, whether there was but one rate, and that the agent of defendant replied that he could not give him any other rate; the plaintiff made no special application for a rate based upon a bill of lading not containing the "fire clause" in question (R., p. 40).

The witness is positive in his declaration that he asked defendant's agent what was the rate to New Orleans, and the answer was that he had but one rate, and he could not give him any cheaper or dearer rate (R., p. 41); nothing was said by the agent as to a different kind of contract that could be given to the plaintiff; plaintiff's agent was not told that he could obtain from the company a contract of carriage under which it would be liable, practically, as an insurer, or, if he chose, a contract under which it would not be liable in case of fire; that no information was given by the agent of defendant upon which plaintiff's representative could have made a choice between these two kinds of contract; plaintiff was offered no option, nor any choice of selection as to the kind of contract under which the company would ship his cotton (R., p. 42).

ASSIGNMENTS OF ERROR.

The following are the assignments of error:

First. That the court erred in finding that there was no error in the refusal of the circuit court of the request of plaintiff for a direction or instruction to the jury to find, upon the whole of the evidence offered by both plaintiff and defendant and submitted to the jury, a verdict for

plaintiff; that the circuit court of appeals should have held that there was error in the said refusal of the circuit court.

Second. That the court erred in finding that there was no error in the circuit court in its direction or instruction to the jury to find a verdict for the defendant; that upon the whole of the evidence offered and submitted to the jury by both plaintiff and defendant the said direction or instruction of the circuit court to the jury was error; and the circuit court of appeals committed error in not finding that there was error in the direction or instruction of the circuit court to the jury to find a verdict for the defendant.

Third. That the circuit court of appeals erred in finding that there was no error in the refusal of the circuit court to allow the submission to the jury of the question whether or not, upon the whole of the evidence offered and submitted to the jury by both plaintiff and defendant, the destruction of plaintiff's cotton, as stated in his petition, was not due to or caused by the negligence of the defendant; that the circuit court of appeals should have reversed the judgment of the circuit court upon the ground that the question whether or not the destruction of plaintiff's said cotton by fire was due to or caused by defendant's negligence should have been submitted to the jury in the circuit court.

Fourth. That upon the whole of the evidence offered by both plaintiff and defendant, and submitted to the jury, it was clearly shown that the destruction of the cotton of the plaintiff described in the petition was due to and caused by the negligence of the defendant from which neither the law

or public policy permits or will permit the defendant to stipulate for its non-liabilities; that from the whole evidence, offered by both plaintiff and defendant, and submitted to the jury herein upon the trial of said cause, and upon which their verdict is to be found, it clearly appeared that the loss and destruction by fire of plaintiff's cotton described in the petition was due and caused solely by the negligence of the defendant; and that it was liable for the loss and destruction of plaintiff's cotton, the stipulation in the bill of lading herein exempting the defendant from any liability for loss or damage to said cotton by fire, to the contrary notwithstanding; and the circuit court, in not so holding, and so directing and instructing the jury, committed manifest and grievous error to the prejudice of plaintiff.

And the said court committed grievous and manifest error in directing and instructing the jury as aforesaid, upon the whole of the evidence offered by both plaintiff and defendant, this constituting all the evidence before the jury, to find a verdict for the defendant.

That the circuit court of appeals committed error to the prejudice of plaintiff in not finding, upon the grounds hereinbefore set out in the four assignments of error, that the circuit court committed error to the grievous injury of plaintiff, and upon the grounds and reasons set out in these four assignments of error should have reversed the judgment of the circuit court.

SYLLABUS.

In order to be binding upon the shipper, a contract limiting the common-law liability of a carrier must be upheld by a valid consideration.

Hutchinson on Carriers, sec. 278.

Wehman *vs.* Minneapolis, etc., Co., 61 Am. & Eng. R. Cases, 273.

Contracts limiting the common-law liability of carriers are not favored by the law, and they are not binding on the shipper unless fairly made and freely entered into by him.

Adams Express Co. *vs.* Nock, 2 Duval (Ky.), 562–565.

Hance *vs.* Wabash, etc., R. Co., 56 Mo. App., 476–482

In order to be valid, such contract must be the choice of the shipper and not of the carrier. The shipper must be allowed an option or opportunity to select under which, the common-law or limited liability, he will ship his goods. If such free choice or option is not allowed him, the contract is not reasonable and therefore is void. Both rates, that for transportation under the common-law liability and that under the limited liability, must be free to the shipper, in order that he may have real liberty of choice in making the selection between the two; otherwise the contract limiting the liability is not fair or reasonable, and therefore is void.

Atchison, etc., Co. *vs.* Dill, 56 Am. & Eng. R. Cases, 376.

Dovignac *vs.* Mo. Pac. R. Co., 57 Mo. App., 550.

Lewis *vs.* Great Western R. Co., 3 Q. B. Div., 195: 47 L. J., Q. B. Div., 131.

Car *vs.* Lancashire, etc., Co., 21 L. J., Exch., 261; 7 Exch., 707.

L. & N. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. Cases, 372–375.

A carrier is not permitted to so limit its liability as to exempt it from the consequences of its own negligence.

N. Y. Central R. Co. *vs.* Lockwood, 17 Wall., 357–384.

Where there is a clause limiting the liability of a carrier, it bears the burden of proof to show not only that the cause of the loss was within the exemption, but also that it was not due to its negligence or that of its servants.

South, etc., Co. *vs.* Henlin, 56 Ala., 606 (23 Am. Dec., 598).

Inman *vs.* South Carolina R. Co., 129 U. S., 128–139.

Duvenick *vs.* Mo. Pac. R. Co., 57 Mo. App., 550–555.

Dillard *vs.* L. & N. R. Co., 2 Lea (Tenn.), 288.

Steele *vs.* Townsend, 37 Ala., 247.

Adams Exp. Co. *vs.* Stetaners, 68 Ill., 184 (14 Am. Dec., 457).

Texas, etc., Co. *vs.* Richmond, 94 Tex., 571 (63 S. W., 619).

T. & P. R'y Co. *vs.* Clayton, 173 U. S., 348.

In Louisiana, where the contract exempts the carrier from any loss by fire, he carries the burden of proving not only the exemption, but also that the loss was not due to the carrier's negligence or omission of duty in any manner causing or contributing thereto.

Maxwell & Putnam *vs.* So. Pac. R. Co., 48 La. Ann. Rep., 397.

Roberts *vs.* Riley, 15 La. Ann. Rep., 103.

Hunt *vs.* Morris, 6 Martin (La.), 680.

ARGUMENT.

The various assignments of error may all be discussed together, the first proposition being, that in order to support the exemption of the defendant company for any liability for the loss of cotton destroyed by fire, there must have been some consideration, other than the mere contractual relations of the parties, moving from the carrier to the shipper.

Wehmann *vs.* Minneapolis, etc., Co., 61 Am. & Eng. R. R. Cases, 273.

In order for such consideration to be valid, it must appear that both rates of transportation offered the shipper were reasonable, and that he had a genuine freedom of choice in making his selection.

Atchison, etc., Rwy. *vs.* Dill, 56 Am. & Eng. R. R. Cases, 376.

Duvenick *vs.* Mo. Pac. R. R. Co., 57 Mo. App., 550.

In Gulf, etc., R. R. Co. *vs.* McCarty, 82 Tex., 608, it was held, that even where the special contract limiting the carrier's liability recited that it was "in consideration of reduced rates" the shipper consented to a limitation of the carrier's liability, and it was further shown that *no reduced rates* were allowed the shipper, the limitation was held to be invalid as being without consideration.

And in order to uphold said contract it was decided in L. & N. R. R. Co. *vs.* Sowell, 49 Am. & Eng. R. R. Cases, 166,

that where there was controversy as to whether the carrier offered or was ready to ship under any other than a special contract limiting its liability, evidence tending to show that the shippers were allowed a choice of contract under which to ship, and, also, their instructions to their agents, was admissible in behalf of the carrier.

Where the carrier relied on the provisions in a contract exempting it from liability for delay, this provision was held invalid, where the only consideration therefor was the reduced rate granted, and it further appeared that this rate was allowed only in consideration that the goods be shipped at the owner's risk.

San Antonio, etc., R. R. Co. *vs.* Barnett, 34 S. W. Rep., 139.

Where it was stipulated that the liability of a carrier for an animal should not exceed a certain amount, but the charge for transportation was to be determined according to schedule rates, it has been held that such a contract was not one which fixed a correct valuation on which to base a rate of carriage, and the extent of the carrier's liability for the loss, but left the value to be ascertained from other evidence; in this case it was held that there was no consideration for the attempted exemption, and it was no defense to the carrier.

Kellerman *vs.* K. C., etc., R. R., 34 S. W. Rep., 41.

It is also settled that where no form of choice is shown to have been offered the shipper, and he, in reality, was allowed no option or selection as to the kind of contract under which he could ship his goods, nor was offered any difference in

rates, the contract limiting the carrier's obligation was a mere form, was without consideration, and could not be relied on.

Duvenick *vs.* Mo. Pac. R. R., 57 Mo. App., 550.

In Little Rock, etc., R. R. Co. *vs.* Cravens, 55 Am. & Eng. R. R. Cases, 650, it was distinctly held that a carrier could not limit its liability at all, unless the shipper was given an actual freedom of choice between the different kinds of contracts under which the company would carry the goods, and this even where shipper does not demand different terms.

In this case it appeared that the shipper had actual knowledge of the clause in the contract limiting the carrier's liability, and it further appeared that the latter had fixed a rate of transportation between the two points in question, and that no different rate or terms were obtainable, and the finding of the court was that there had been no freedom of choice, under these conditions, afforded the shipper, and hence the special modification restricting the carrier's liability was without consideration to support it.

It appears here, from the evidence of Pons, and also especially by the circular or tariff sheet issued by defendant or for its benefit, that the only rate of freight obtainable at all from it from Texarkana to New Orleans was sixty cents per hundred weight, the actual freight charged, and had plaintiff endeavored to obtain any other rate he would have been unsuccessful, because the agent at Texarkana had no authority to give it to him.

It is obvious that if the defendant charged the same rate for carrying plaintiff's cotton under its common-law liability, under which it would be responsible for loss by fire,

as it did actually charge for the contract, under which it would not be liable for loss by fire, there is here no valid consideration, because the charge for carrying under an unlimited liability is the same as that made for the same service restricted.

Michigan Central, etc., Co. *vs.* Hale, 6 Mich., 257, 258.

It is shown by the evidence of Pons that the agent of the company, who was not examined as witness, had no authority to offer transportation between Texarkana and New Orleans except at the fixed rate of sixty cents per hundred, which had already been fixed by his superiors. From this it would appear that there was no real option as to a choice of rates or different kind of contract really offered to the shipper by the company, and therefore none could be set up as a consideration passing to the shipper in support of the special limitation of liability.

L. & N. R. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. R. Cases, 372.

It is abundantly shown by the testimony, a part of bill of exception No. 1, that the contract was not reasonable, and hence it was void. Even where the limitations of liability are agreed to by the shipper in consideration of a reduced rate, if the carrier's rules would not have permitted the freight to be shipped unless the shipper accepted a bill of lading with the limitations as to this latter, it is void and of no effect.

St. Louis, etc., Co. *vs.* Spann, 57 Ark., 127.

It is clear here that plaintiff under no circumstances could have obtained from the defendant at Texarkana any kind of a bill of lading besides that under which he actually shipped, and hence defendant had placed itself in a position where it was unable or had deliberately refused in advance, even before it was asked, to allow the shipper any liberty at all in selecting the kind of contract under which he should ship, or by any rate other than that which he actually secured, which was absolutely and unalterably fixed in advance.

Contracts limiting the common-law liability of carriers are not specially favored in the law, and in order for any such contract to be binding on the shipper it must be fairly made and freely entered into by him.

Adams Express Co. *vs.* Nock, 2 Duval (Ky.), 562.

Hance, etc., *vs.* Wabash Western R. R. Co., 56 Mo. App., 476.

The carrier would be obliged to receive plaintiff's cotton and transport it under its common-law liability if the shipper had insisted upon it.

Wallace *vs.* Matthews, 99 Am. Dec., 473.

And here the plaintiff's agent was not allowed any opportunity to elect whether or not he would ship under the defendant's liability at common law or under its restricted liability as established by its attempted limitations, the contract limiting the carrier's liability is void.

It is not denied that the carrier may by special contract stipulate against any liability for the loss by fire of certain goods, but such liability must represent the consent of and choice of the shipper and not of the carrier; such contract

must be reasonable, must be based upon a sufficient consideration, and must be fairly and freely made by the shipper, otherwise it is not binding upon him.

A fair reading of the testimony of Pons would show that he was not allowed to choose whether he would ship under defendant's common-law liability or to make a contract for such service under restrictions. It may have been that he preferred a cheaper service with limited liability to a more expensive service with an unlimited liability, but it does not appear that he made any choice as to either one of these or was permitted any opportunity to do so.

The burden of proving not only the reasonableness and fairness of the stipulation limiting the company's liability was upon the carrier itself, and it was unreasonable, save when a fair and genuine option has been given the shipper, to choose the kind of contract or the rates of freight under which he should ship.

Lewis *vs.* Great Western R. R. Co., 3 Q. B. Div., 195. 47 L. J., Q. B. Div., 131.

Atchison, etc., Rwy. Co. *vs.* Dill, 56 Am. & Eng. R. R. Cases, 376.

A carrier cannot force upon the consignor a contract limiting the carrier's liability; the consignor may refuse to accept such a contract and insist upon the company taking his goods, subject to the general liability of common carriers, and this implies that he must have an option or chance of making his selection before or at the time of their refusal or allowance.

Carr *vs.* Lancashire, etc., Co., 21 L. J. Exch., 261; 7 Exch., 707.

The defendant offering its service to the public as a common carrier, and enjoying advantages and franchises as such, must be ready to do the business of a common carrier with the measure of responsibility imposed by the common law; but it may, at the same time, offer to do the same business under a limited liability, the limitation being fair and reasonable and resting upon a full consideration. An offer or readiness to transport the goods of its customer with one or the other degree of responsibility, it has been held, is as little as can be required of any common carrier; less than this does not present a *bona fide* reasonable alternative.

L. & N. R. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. R. Cases, 372, 375.

It is not shown here, nor was it attempted to be shown, that the plaintiff was offered any opportunity to choose between the two kinds of contracts—whether he would have shipped his cotton at his own risk, at a lower rate, or at the company's risk at a higher rate. He was told that the company had but one rate and but one kind of contract, which, of course, deprived the shipper of any option or choice of his own at all and left him the alternative of either shipping his cotton under such conditions as the company choose to make or not shipping it at all.

From a careful consideration of all the cases the following propositions appear to be axiomatic:

Originally there was no limit to the liability of a common carrier save by fortuitous event.

That in modern times a carrier may by special, express agreement limit his common-law liability.

That there must be a substantial consideration for such limitation.

That such exemption must be reasonable.

That he cannot stipulate for exemption for the negligence of his employee.

Complete reliance is placed by defendant and by the judge of the circuit court and the judges of the court of appeals upon what is known as the York case, reported in 3 Wallace, p. 107.

We believe that confidence is based upon an entire misapprehension of the principle laid down there as applied to the facts here.

Says Mr. Justice Field:

"Nor do we perceive any good reason, on principle, why parties should not be permitted to contract for a limited responsibility. The transaction concerns them only; it involves simply rights of property; and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in face of a special agreement for its relinquishment. By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire.

"The law prescribes the duties and responsibilities of the common carrier. He exercises in one sense a public employment, and has duties to the public to perform."

* * * * * * *

"He is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although without any fault or neglect on his part, and he cannot, by mere act of his own, avoid the responsibility which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he

coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused.

"The owner of the goods may rely upon this responsibility imposed by the common law, which can only be restricted and qualified when he *expressly stipulates* for the restriction and qualification. But, when such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement.

"The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded."

In the case at bar there was no agreement at all.

There was simply a notice in the bill of lading.

There was no consideration *even* for such a notice.

There was but the one rate of freight. The shipper was compelled to ship in that way or not at all.

There was no scale of prices "proportioned to the risks assumed."

The carrier is bound to assume responsibility for the negligence or carelessness of his employee.

The law never requires the impossible.

And he who can best prove a fact, even though it involves a negative, must do so.

Even, *arguendo*, had there been a special agreement between the shipper and the carrier, for a consideration, exempting the carrier from responsibility for loss by fire, the

carrier would be compelled to show that such loss occurred through no fault or negligence of its employee.

It is utterly impossible for the shipper ever to show that a fire or loss occurs through the fault or negligence of the carrier's employee; for, when the goods are once delivered, they pass completely from the power, supervision, and control of the owner into that of the carrier.

The owner's dominion ceases, and should he attempt in any way to direct their care or shipment the effort would be resented as an interference totally unauthorized.

"*The owner of the goods may rely upon this responsibility imposed by the common law, which can only be restricted and qualified when he expressly stipulates for the restriction or qualification.*"

Where in this case is there any stipulation by which the shipper agreed to restrict the common-law liability of the carrier?

"*He cannot screen himself from liability by any general or special notice.*"

Is there anything in this case that can be dignified by the term "agreement"? Is the statement in the bill of lading anything more than a notice?

Who in the press of business can be expected to read such documents as the bill of lading in this case, and what layman can understand them?

"There is no doubt of the general proposition that restrictions upon the liability of a common carrier, inserted by him

in the bill of lading for his own benefit, and, in language chosen by himself, must be narrowly construed."

"Queen of the Pacific," 180 U. S., 52.

T. & P. Ry. Co. *vs.* Reiss, 183 U. S., 626.

"An exception in its bill of lading 'that the express company is not to be liable in any manner or to any extent for any loss or damage or detention of such package, or its contents, or of any portion thereof, occasioned by fire,' does not excuse the company from liability for the loss of such package by fire, if caused by the negligence of a railroad company to which the former have confided a part of the duty it had assumed."

"Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing his duty, shall not be taken away by any reservation in his receipt, or by any arrangement between him and the performing company."

Bank of Kentucky *vs.* Express Co., 93 U. S., 174.

It has been repeatedly held in the Louisiana courts that the clause, "nor for any damage or injury thereto by water, moisture, etc.," is unreasonable, and that the shipper having shown that the cotton when delivered was so damaged, the burden is on the carrier to show that it did not occur through its fault or negligence.

Phelps & Co. *vs.* T. & P. Co., 1017 C. of A.

Phelps & Co. *vs.* T. & P. Co., 1190 C. of A.

Phelps & Co. *vs.* T. & P. Co., 1205 C. of A.

Kressner *vs.* T. & P. Co., 1189 C. of A.

Eitzen *vs.* T. & P. Co., 2263 C. of A.

"All the bills of lading are dated in October, 1883. The defense is that the bills contained the stipulation 'that the

carrier shall not be liable for loss or damage of any kind occasioned by delays from any cause and that if liable the defendant has not been put *in mora*, and these were pleaded by way of exception.'

"The first point seems not to be relied on as it need not be, since a clause stipulating non-liability for loss from delays from any cause has uniformly been held unreasonable, and the insertion of it in a bill of lading will not relieve the carrier from liability for losses occasioned by negligence (Addison's Contracts, 780; Myers' Fed. Dec., 611, 626)."

Berge *vs.* T. & P. Co., 37 La. A., 470.

"The force and effect of the law, as modified by the contract, is fully alleged on the one hand and admitted on the other. The loss and resulting damage being admitted, the defendant carries the burden of proving that the loss was 'not due to the company's negligence,' nor to any 'omission of duty,' in 'any manner causing or contributing thereto.'"

Maxwell & Putnam *vs.* R. R., 48 A. (La.), 385.

"In those cases which are not readily supposed to happen, without negligence, such as a loss by robbery, fire, &c., the carrier is bound to show that they happened without any fault or negligence on his part." * * *

"This rule gives to the plaintiff the advantage of implied or presumptive evidence of negligence, on the part of the masters or owners, which they are bound to disprove by showing due diligence."

Hunt *vs.* Morris, 6 Martin (La.), 676.

To the same effect appears to be the tendency of this court.

"To secure care, diligence and fidelity in the discharge of his important public functions, the common law charged the common carrier as an insurer; but the rigor of the rule has

been relaxed so as to allow reasonable limitations upon responsibility at all events, to be imposed by contract. We have, however, uniformly held, that this concession to changed conditions of business cannot be extended so far as to permit the carrier to exempt himself, by a contract with the owner of the goods, from liability for his own negligence. And as in case of loss the presumption is against the carrier, and no attempt was made here to rebut that presumption, the defendant's liability because in fault must be assumed upon the evidence before us."

Inman *vs.* Ry. Co., 129 U. S., 172–139.

T. & P. Ry. Co. *vs.* Clayton, 173 U. S., 348.

The rule of reasonableness has also been laid down by the court:

1st. "That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and therefore not binding."

2d. "That every attempt of carriers by general notice or special contract to excuse themselves from responsibility for losses or damage resulting in any degree from their own want of care or faithfulness, is against that good faith which the law requires as the basis of all contracts of employment."

Railroad Co. *vs.* Lockwood, 17 Wallace, 383.

The shipper was notified that there was but *one rate* and *one form* of contract, and he was compelled to accept the terms and conditions if he desired to ship. There was no alternative, no choice for him.

The shipper was compelled to take a bill of lading declaring that the carrier will not be responsible for loss by fire; and in case of loss by fire that he will have to take upon

himself the impossible task of proving negligence of the servants of the defendant.

Immediately upon the issuance of the bill of lading the carrier took out a policy insuring it against loss by reason of the negligence of its employees.

Thus the carrier has placed itself in a position, if the defense here can prevail, where the shipper has to watch its employees from the receipt to the delivery of the cotton, and where it is a matter of indifference to it whether the employees handle the cotton carelessly or not.

It is paid for carrying the goods; but whether they are lost or not is a matter that does not concern it, for in no manner can it be held for their safe-keeping and delivery.

Let us suppose that this cotton was destroyed by fire five hundred miles from the point of shipment or delivery, at some interior point away from any station, in the open prairie or in the woods away from human habitations, where none but the crew of the train could have seen it. No matter how gross the carelessness of the employees, the brakeman might have smoked his pipe or thrown a lighted match upon it, it would be impossible, utterly impossible, for the shipper to know or to show this fact.

Another instance: Suppose the cotton lost by fire in the warehouse or cars of the company at the point of shipment or delivery, should not the carrier be compelled to prove that he had provided every precaution to safeguard the property against such a casualty, or should he be permitted to say, "The property was lost by fire, whether through the carelessness of my employees or not, I do not know, and do not care. If you wish to hold me responsible,

you must prove that I could have prevented the loss and did not do so?"

How can the plaintiff prove any such fact? The possession of the property; the control of the premises; the supervision of its employees—all are in the exclusive dominion of the carrier.

The shipper cannot touch the property; he cannot direct the employees.

Yet, under the doctrine contended for by defendant, the plaintiff would have to prove facts which it is impossible for him to get, and which are peculiarly within the knowledge of defendant, before he could recover.

It is confidently submitted, then, that the defendant took the goods in this case under the common law, that its liability was to safeguard and deliver it, and that in order to relieve itself from responsibility for the destruction or non-delivery it must show conclusively that it exercised every care, and that its failure to perform the contract of carriage was due to no fault of its own.

The judgment brought here by writ of error should be reversed.

Respectfully submitted.

B. K. Miller,
W. S. Parkerson,
Counsel for Plaintiff in Error.

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preme Court of the United States.

OCTOBER TERM, 1892.

No. 57.

JOVITE CAU,
Plaintiff in Error,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

RIEF FOR THE TEXAS AND PACIFIC RAILWAY COMPANY.

WILLIAM WIRT HOWE,
JOHN F. DILLON,
WALKER B. SPENCER,
For Texas and Pacific Ry. Co.

C. G. Burgevin, Walker and Centre Streets, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 57.

JOVITE CAU,
Plaintiff in Error,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

BRIEF FOR THE TEXAS AND PACIFIC RAILWAY COMPANY.

This action was brought in the Civil District Court for the Parish of Orleans, and thence removed to the United States Circuit Court for the Eastern District of Louisiana.

It was brought to recover the value of certain cotton alleged to have been delivered to the defendant at Texarkana, Texas, for carriage from that place to the City of New Orleans, and which it was claimed was destroyed by fire after it had come into possession of the railway company as a common carrier and after it had issued its bills of lading to carry the same.

Tr., pages 2 and 3.

The plaintiff in his petition referred to the fire clause in the bills of lading, being clause No. 3, providing that neither The Texas and Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to, or destruction of, said cotton by fire (Tr., pp. 19, 22, 25 and 27); but he averred that he did not receive any consideration from the railway company for such limitation of its common law liability and, further, that the clause was not binding upon him because the destruction of the cotton was due to the negligence of the railway company, and also because the cotton was received by the railway company prior to its issuance of the bills of lading and it was claimed that the railway company was without authority, after the receipt of the cotton, to limit its liability (Tr., p. 3).

The answer and amended answer of The Texas and Pacific Railway Company, found at pages 9 and 10, after the plea of the general issue, avers that the conton involved in the case was received under bills of lading in the possession of the plaintiff, and to which reference is made, and admits that such cotton was destroyed by fire at the time and place alleged in plaintiff's petition ; but it alleges that the bills of lading aforesaid evidencing the contracts between the parties and expressing the terms and conditions upon which the cotton was to be trasported by the defendant railway, contained the express stipulation, among others, that this defendant shall not be liable for the loss of, or damage to, said cotton by fire, and defendant expressly claimed and pleaded the benefit of this exception as well as of all other stipulations and conditions in the bills of lading contained.

The defendant further averred that the plaintiff had

no real or substantial interest in the subject matter of the suit, inasmuch as prior to the institution of the suit he had parted with all his right, title, and interest and to any claim or demand that for any reason he might have had against the defendant in the premises, to certain insurance company or companies.

The case was tried before a jury, and the five bills of exceptions (pp. 14–54) purport to contain the testimony in the cause.

The transcript is not very well made up, as for example, at pages 29–54, we have some answers to interrogatories without the interrogatories themselves. However, there is quite enough in the record to justify the affirmance of the judgment of the Court of Appeals, and of the court of first instance.

On motion of counsel for the defendant railway company, the Court of first instance directed a verdict in favor of the defendant, and refused to give certain instructions to the jury asked for on behalf of the plaintiff, which will be referred to hereafter in this brief (p. 11). The plaintiff moved for a new trial (p. 11), and Judge PARLANGE, who presided at the trial, denied the motion for a new trial for written reasons found at pages 58–60, and judgment was rendered upon the verdict in favor of the defendant railway company dismissing the suit with costs (p. 14; see, also, below, p. 20).

Thereupon, the plaintiff removed the cause by writ of error to the United States Circuit Court of Appeals, where a judgment was rendered January 7, 1902, affirming the judgment of the lower Court (p. 61). The opinion of the Court of Appeals is found at pages 63-4; see, also, below, p. 22).

Thereupon, the plaintiff removed the cause to this

Court by writ of error (p. 66), and filed assignments of error, which will be considered in the order pursued in plaintiff's brief.

Evidence.

Plaintiffs introduced in evidence the four bills of lading issued and covering the cotton shipped, the value of which is herein sued for (pp. 18–28). Each of the bills of lading contain a stipulation exempting the carrier from liability for damage to or destruction of the cotton by fire (p. 22).

Plaintiff introduced the deposition of Geo. West (p. 29), who stated that he was superintendent of the Union Compress Company at Texarkana; that the 110 bales of cotton were destroyed by fire *at the compress;* that the cotton was covered by insurance carried by the Union Compress Company in favor of the transportation companies; this insurance covered only *the legal liability of the carrier.* See form for such insurance (pp. 32, 48).

The deposition of F. W. Offenhauser was read (p. 30). He testified in effect that he knew nothing of the particular facts concerning this shipment. He testified to the practice or course of dealing of the Union Compress Company to the effect that it takes out insurance for the benefit and in the name of each railroad compressing cotton at their press; that this rule applied to all cotton coming into the possession of the compress company for account of the railroads.

V. W. Pons was then sworn and testified for plaintiff (p. 34), that he was agent of the plaintiff who contracted for and made the shipment in question. The

essence of his testimony is as follows: That he inquired of the agent of the railway company the rate on cotton from Texarkana to New Orleans; that the agent told him there was one rate of 60 cents. He procured from the agent blank bills of lading; that the bills of lading were filled out at his office, all except the signature by its agent, and that they were then carried to the office of the railway company and there signed by the agent. He states that the railway company did not pay him anything for the fire exemption; that he did not know that such exemption was in these particular bills of lading; that he did not ask the privilege of shipping the cotton in any other way than under the special contract evidenced by the bills of lading; that he expected to ship it in the regular way and wanted the bills of lading so that he could utilize them by drawing money on them through the bank; that no other character of shipment than that under special contract was talked of between him and the agent. This witness testified to having obtained a tariff sheet from another railroad, but which purported also to be the tariff sheet of the defendant railway company. This tariff sheet was introduced in evidence (p. 17), and showed the rate to be 60 cents, as stated by the agent. This is for depot delivery. Shipside delivery is stated to be 63 cents.

It appears from a provision contained in the tariff sheet that New Orleans shipside rate is to be used only as a basis in arriving at through rates on cotton for export, and that no contract will be made on bill of lading for New Orleans shipside delivery.

Witness further testified that the cotton was destroyed by fire while at the compress after issuance of bills of lading.

Neither he nor any other witness testified to the circumstances under which the cotton caught fire and was destroyed. There was no pretense whatever that the fire was caused by any fault or negligence on the part of the defendant railway company.

The above constitutes practically all the evidence introduced by the plaintiff to support his case, and from this statement it will be seen that the sole issue on the trial was one of law, namely: whether the fire exemption contained in the several bills of lading was valid and binding upon plaintiff in error, or, to state the contention in another form, whether such exemption provision became nullified and void by reason of the facts shown on the trial.

The contention of plaintiff in error is that the clause in each of the bills of lading exempting the carrier from liability for damage or destruction of the cotton by fire has no binding effect or legal force. This legal proposition is rested upon the theory that no option was extended to the shipper of shipping the cotton upon any other terms than that contained in the bill of lading, and that no consideration was paid by the carrier to the shipper for such exemption from liability on account of damage or destruction by fire.

In answer to this contention and in support of the judgment in our favor, we submit :

I.

A common carrier may limit its liability, as it exists at common law by special contract of shipment assented to by the shipper, except as against its own negligence.

This proposition has ceased to be questioned since the decision by the Supreme Court of the United States, of the cases of

New Jersey Steam Navigation Co. vs. Merchant's Bank, 6 Howard, 344.
York vs. Central R. R. Co., 3 Wallace, 107.
Clark vs. Barnwell, 12 Howard, 272, 280.
Transportation Co. vs. Downer, 11 Wall., 129, 134.
R. R. vs. Reese, 10 Wall., 176–190.

Such limitation or diminution of the carrier's liability cannot be effected by mere notice or advertisement, but must be stipulated for in the contract of shipment; and when such limitation is stipulated for in the contract of shipment entered into by and between the carrier and the shipper, it is binding and effectual.

In the case of Railroad Company vs. Mfg. Co., 16 Wallace, 328, the Supreme Court says:

"Whether a carrier when charged upon his common law responsibility can discharge himself from it by special contract, assented to by the owner, is not an open question in this court since the cases of The New Jersey Steam Navigation Company v. The Merchants' Bank, and York Company v. Central Railroad. In both these cases the right of the carrier to restrict or diminish his general liability by special contract, which does not cover losses by negligence or misconduct, received the sanction of this court. In the former case the effect of a general notice by the carrier seeking to

extinguish his peculiar liability was also considered, and although the remarks of the judge on the point were not necessary to the decision of the case, they furnish a correct exposition of the law on this much-controverted subject.

" In speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said : ' It by no means follows that this can be done by an act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public limiting his obligation, which may or may not, be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.' "

The limitation of the carrier's liability in this case against damage or destruction of the cotton by fire was expressly stipulated for in the contract of shipment and does not rest upon any notice or advertisement to shippers generally. If the right exists to limit the carrier's liability against damage or destruction of the cotton by fire, as has been expressly determined, then this right was exercised in this shipment in a manner which has received the sanction of the highest judicial tribunal of this country and given full legal force and effect.

II.

As stated in the preceding proposition, exemption from liability for damage or destruction of the cotton shipped stipulated for in the special contracts of shipment did not exempt the carrier from liability for damage or destruction by fire resulting from its own negligence, but had the effect to make it encumbent upon the shipper to show that the fire damaging or destroying the cotton resulted from the negligence of the carrier before liability would attach on account of such damage or destruction. In other words, it being shown that such exemption was stipulated for in the special contract of shipment, and that the cotton shipped was damaged or destroyed by fire, no presumption of negligence would arise against the carrier, and in order to recover, the plaintiff would have to show that the damage or loss was caused by the negligence of the carrier.

In the case of Transportation Company vs. Downer, 11 Wall., 133–4, it is expressly held by this Court that where loss is shown to have been within the terms of exemption stipulated for in the contract of shipment, the burden of showing that the loss resulted from the negligence of the carrier rested with the plaintiff. The trial Court there refused a special charge to this effect, and the case was reversed upon that error.

The case of Platt vs. Richmond, etc., R. R. Co., 108

N. Y., 361, involves a fire exemption clause in a bill of lading covering the shipment of cotton. The Court of Appeals held that the stipulations in the contract of shipment were binding upon the shipper, and that the cotton having been destroyed by fire, the company would only become liable upon it being shown that the company was guilty of negligence causing the loss. The burden of showing such negligence was held to be upon the shipper. In the opinion of the Court it is said :

"Theretofore, the bills of lading having been sufficiently proved, and it having been shown that the cotton was destroyed by fire, the burden was upon the plaintiff to establish that the fire was occasioned and the cotton destroyed by the *fraud or gross negligence* of the defendant." (The italicised words were those used in the contract.)

Not only is this a sound proposition of law, but the contract of shipment in question contained a stipulation covering this feature of the case. It is as follows :

"It is further agreed that in case said cotton is found at the point of delivery to have been injured by any of the excepted clauses specified in this bill of lading the burden of proof shall be upon the owner of such cotton or claimant to establish that such injury resulted from the fault of the carrier."

III.

Where the shipment is made under special contract the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire, and it is not necessary that there should be a separate consideration moving from the carrier to the shipper for each provision or stipulation contained in the special contract of shipment. The obligation of the carrier to transport the property shipped is sufficient consideration to support the contract of shipment in its entirety.

In the case of York Company vs. Central Railroad, 3 Wall., 113, cotton was shipped under a special contract of shipment containing exemption from damage or destruction by fire. The carrier was sued for the loss and it was contended that there was no consideration for such exemption. In treating of this proposition the Court said:

"The second proposition is answered by the fact there is no evidence that a consideration was not given for the stipulation. The company probably had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. *Be this as it may, the consideration expressed was sufficient to support the entire contract made.*"

It will be seen that independent of any question of whether there was any separate or specific consideration for the exemption, the Court held that the con-

sideration expressed, to-wit: the obligation to transport, was sufficient to support the *entire contract* of shipment. The agreements were mutual. This conclusion logically and necessarily followed from the principles laid down in a preceding paragraph of the opinion as follows (*Ib.*, p. 112) :

"Nor do we perceive any good reason or principle why the parties should not be permitted to contract for limited responsibility. The transaction concerns them only. It involves simply rights of property, and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in face of a special agreement for its relinquishment. By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire."

In other words, the shipment is not made under the common law liability of a carrier; the parties themselves have chosen that the shipment shall be made under special contract embodying the terms of shipment. The shipper, for good reasons, chooses to ship under special contract arrangement, rather than under the terms which the law itself would impose in the absence of a special contract. The contracting parties may agree upon such terms as they see fit, subject to the limitations that the carrier shall not exempt himself from its own wrong or negligence, and subject to such statutory provisions, if any, as may have relevancy. Under these principles, it is manifest that the expressed consideration in the contract will be sufficient to support it in its entirety. The very written evidence of the contract itself is of special value to the shipper, in that the shipper can utilize it in his banking transactions and obtain money thereon. It is shown by the evidence in this case, and would be

known to the Court aside from the evidence adduced upon the trial, that such bills of lading are so utilized by shippers, especially of cotton, universally.

Again, it will be presumed that in fixing the rate of freight, which was the regular tariff rate in this instance, the rate was fixed with reference to the stipulations in the contract, and that the exemptions from liability therein conceded by the shipper were considered and compensation in the way of reduced charges allowed to such shipper on account of such exemptions. Such is the holding in the York case above cited, and in Hutchinson on Carriers, Sec. 278, second edition, the proposition is stated as follows :

" The law, therefore, will presume that, in fixing the amount of compensation which he (the carrier) is to receive, something has been allowed to his employer (the shipper) in the way of a reduced rate as a consideration to him for agreeing to reduce the responsibility on the part of the carrier, * * * but there is no necessity for resorting to any such presumption, the parties being left free to make their own contract, and, having agreed that in consideration of the payment of a certain price by one, certain services upon stipulated terms as to the responsibility shall be performed by the other, neither can allege that as to him there was no consideration. Such is the general rule as to contracts, and no reason is seen why it should not apply to those between carriers and their employees so long as they are permitted to make their own terms."

In Nelson vs. Hudson River Railroad Company, 48 N. Y., 498, this doctrine was enforced.

In no well-considered case with which we are familiar has it ever been held that the fire exemption contained in a special contract of shipment was not binding upon the shipper upon the ground that no specific consideration was shown to have been paid by or moved from the carrier to the shipper. There are cases

wherein it is stated that a consideration must exist for such exemption. It is elementary that there must be a consideration to support a contract, and such expressions are sound in the general sense, but in no case known to us has it been held necessary that each limitation upon the common law liability of the carrier must be shown to have supporting it a specific and independent consideration moving from the carter to the shipper. The great body of the commerce of this country is transported by common carriers upon special contracts of shipment similar to the one in question, and these contracts have come before the courts of the country for adjudication constantly, and yet in no case where the contract has been entered into voluntarily, free from circumstances of fraud, coercion and duress, has such exemption been stricken down upon the theory that there was no special consideration to support them.

The evidence shows in this case that the shipment was made upon the regular tariff rate, evidently based upon the terms contained in the contract of shipment and if the decisions of the Supreme Court of the United States are to stand, this contract must be upheld in its entirety as supported by sufficient consideration.

Again, as said in the York case cited, *supra*, there is no proof of failure of consideration in this case. It is true that the agent, Pons, who shipped the cotton in question, testified that the railroad company did not *pay* anything for this exemption, but his entire evidence shows that he meant by this that no specific consideration was pointed out to him as being given for this particular exemption. He simply asked the rate of freight and he was

told that there was one rate of sixty cents per hundred pounds from Texarkana to New Orleans. The tariff sheet put in evidence showed two rates, one for delivery at depot, and one for delivery at shipside at New Orleans. It seems from a notation on the tariff sheet that shipside shipment was not to be made, and hence the rate quoted was the tariff rate for the shipment intended. It is further clear from the evidence of the witness Pons, that he intended to make the shipment under special contract by means of which he would be delivered bills of lading. The rate quoted him was the rate fixed for shipments which would be accompanied by the delivery of bills of lading to the shipper. Under its common law liability the carrier would be under no obligation to deliver to the shipper bills of lading. Mr. Pons solicited bills of lading, made them out himself and presented them to the agent for signature. The effect of his testimony is, that he would not have shipped without the delivery of such bills of lading. So that the most that can be said of his testimony touching the question of consideration is that no specific consideration was pointed out to him or paid to him for the fire exemption clause contained in the bills of lading. Under either of the propositions announced in the York case, the plaintiff must, therefore, fail in this suit, because:

1. There was no evidence showing want of consideration; and

2. No specific consideration for the particular clause in question was necessary to make the contract valid and binding, but the consideration therein expressed was sufficient to support the entire contract.

IV.

The issuance of a bill of lading by the carrier and its acceptance by the shipper, creates a contract between the shipper and carrier, and each is bound by the terms of the contract, provided the carrier has resorted to no unfair means of deception or coercion.

It is contended by plaintiff in error that the shipper in this instance had no option between a shipment under common law liability of the carrier and under the special contract liability. If this means anything, it means that the contract of shipment was entered into under circumstances either of fraud or coercion amounting to duress.

The evidence shows that the shipper neither requested the shipment to be made under common law liability of the carrier, nor was it his desire that it should be so made ; his desire was that the shipment should be made so as to enable him to obtain the contract of shipment—bill of lading—to the end that he might utilize it in drawing money thereon from the banks. No question of a shipment under common law liability was mentioned between the parties or thought of by them. The shipment was designed to be made in the ordinary way and according to the regular tariff rate. No representation was made by the agent of the carrier to the shipper as to a shipment under common law liability, and this character of shipment was wholly without the contemplation of either party. There is no indication whatever of any deception on the part of the carrier. The regular tariff was quoted

to the shipper, and at his request bills of lading were furnished him, which he filled out and afterwards presented to the carrier's agent for signature.

The witness, Pons, agent of the shipper, says he did not know of the exemption clause in these particular bills of lading, but it was not pretended that he did not have full and ample opportunity to know of such stipulations in the contract. Why should he not know? He had the bills of lading in his possession, filled them out at his leisure and then took them to the agent for signature. He had been engaged in this business of buying and shipping cotton for many years and had never made a shipment except under special contract involving the issuance and delivery of bills of lading.

While some of the cases, in discussing the question of the binding force of such exemptions in bills of lading, use the expression that the option must be given to the shipper to ship either under common law liability or under the special contract, yet none of these cases hold that it is requisite that the carrier must affirmatively state to the shipper that he has such option. The carrier must not prevent or refuse the exercise of the option, but it is nowhere held that it must take the initiative and instruct the shipper that he has an option and extend to him the privilege of exercising it.

Hutchison on Carriers, at Section 240, states the principle in this language:

"Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as evidence of the receipt of

the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be willfully blind and plead ignorance when it was his duty to know, and knowing in such cases is assenting. If it was his intention to hold the carrier to his common law liability he should have said so, and have either declined to employ him or sued him for his refusal, after tendering a reasonable sum for his services and risk."

In Germania Fire Insurance Company *et al.* vs. M. & C. R. R. Co., 72 N. Y., 93, it is said :

"As a general rule when goods are delivered to a carrier for transportation, and bill of lading or receipt is delivered to the shipper, he is bound to examine it and ascertain its contents, and if he accepts it without objection he is bound by its terms and resort cannot be had to prior parol negotiations to vary them (Long v. Central R. R. Co., 50 N. Y., 76). Neither can he set up ignorance of its contents (Belcher v. Dinsmore, 51 N. Y., 166; Stevens v, Liverpool, etc., S. S. Co., 57 N. Y., 1; McGee v. C. & A. R. R. Co., 45 N. Y., 514)."

In the case just quoted from, the bill of lading was delivered after shipment and not objected to, and it was held to bind the shipper by the fire exemption clause therein contained. Such is believed to be the effect of the decisions generally and the principle is uniformly announced by text writers. Not only was the shipper bound to take notice of the stipulations in the contract under the obligations imposed by law upon him, but the contract itself expressly imposed that obligation. In the bills of lading this provision is to be found :

"9. That the acceptance of the bill of lading shall be deemed conclusive proof of the assent of the owner of said cotton and all of the terms and conditions written or printed hereon."

Again, we submit that no such issue as that the contract was procured by deception, fraud or coercion is

raised by the pleadings in this case. The plaintiff's allegations nowhere intimate that any unfair means was adopted by the railway company in order to procure his assent to the special contract of shipment, or that he was in any way coerced into assenting to such contract. It is submitted that such an issue, nullifying the terms of the contract sued on, must be specially pleaded before it could properly arise in the case.

V.

The propositions heretofore urged, which are supported, as we contend, by reason and authority, meet every phase of the legal contentions made by the plaintiff in error upon the trial of this case in the Court below.

In the last analysis the contention is that the carrier should not be exempted from loss by fire not occurring through its negligence, because the carrier did not name and pay a specific consideration for such exemption, and because the carrier did not expressly notify the shipper of his legal option to make the shipment under the common law liability, or under the special contract arrangement. There is nothing else to the case, and if the fire exemption clause is to be stricken down this must be done upon one or both of the grounds just stated. There is no pretense of evidence that the fire occurred through the negligence of the railroad company.

Judge Parlange, the distinguished Judge who tried the case in the court of first instance, very clearly and forcefully presents the only questions involved, in his opinion setting forth the reasons for refusing a new trial as follows (p. 58):

"The sole question in this case is whether the clause in the bill of lading exempting the carrier from liability for loss by fire is binding on the plaintiff. No negligence is charged against the carrier.

"The shipment was made by the plaintiff's agent, an intelligent and experienced buyer and shipper of cotton. He is presumed to have known the law and to have been aware that the carrier, if he so desired, was compelled to take the freight under its common law liability, without the 'fire clause.' Furthermore, it was proven that prior to the shipment plaintiff's agent called for blank bills of lading, took them to his office, and in his own time, filled them and then presented them for signature by the carrier. This fact, together with the general knowledge which the plaintiff's agent must have had from his previous experience in shipping cotton, makes it certain that as matter of fact the plaintiff's agent knew of and assented to the 'fire clause.' Shippers have been held bound by the 'fire clause' in a bill of lading, even when they claimed that they did not know that the clause was in the bill of lading, provided they were afforded a full and fair opportunity to acquaint themselves with the contents of the bill of lading. Failure to read the bill of lading has been held, under the circumstances, not to avail the shipper. But, of course, the present cause is one in which, as matter of fact, the shipper knew or must be held to have known that the bill of lading contained the 'fire clause.' **I am clear that there is nothing in the evidence which would invalidate the bill of lading for duress, concealment, fraud or misrepresentation by the carrier.**

"The case of York Co. vs. Central R. R., 3 Wall., 107, was a stronger case against the carrier than the present case. It turned like the present case, upon the acceptance of the bill of lading by the shipper; but it was complicated by the fact that the shipper had not examined the bill and had no authority from his

principal to agree to the 'fire clause.' Yet the Supreme Court held that the 'fire clause' was valid.

"That in the present case the 'fire clause' is binding on the shipper, I consider to be clear.

"See: York Co. v. Central R. R., *supra*;
"Platt v. Richmond, &c., R. R., 108 N. Y.,
"358;
"Germania, &c., Co. v. M., &c., R. R. Co.,
"72 N. Y., 90;
"Nelson v. H., &c., R. R., 48 N. Y., 498;
"Hutchinson on Carrier, 2d Ed., Sec. 278,
"specially the latter part thereof.

"In the same work, Sec. 240, it is said: 'Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common-law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be willfully blind and plead ignorance when it was his duty to know, and knowing in such cases is assenting. If it was his intention to hold the carrier to his common-law liability, he should have said so, and have either declined to employ him or sued him for his refusal, after tendering a reasonable sum for his services and risk.' See cases there cited.

"See same work as to limitation of carrier's liability by contract, Sec. 225 *et seq.*

"Limitation of liability contained in a bill of lading accepted by shipper is binding upon him (Wood on R. R., Minor's Edition of 1894, Vol. 3, Sec. 425, pp. 1881, 1882, and cases there cited).

"In the United States the rule is generally recognized that acceptance by the shipper of a bill of lading containing a limitation of the carrier's liability is binding on the shipper when the limitation is not illegal or unreasonable; and the shipper is conclusively presumed to have read and assented to the provisions of the bill of lading (see Amer. & Eng. Enc. Law (2d edition), Verbis 'Carriers of Goods,' Vol. 5, pp. 293 and 294 and cases there cited).

"A further citation of authorities on the point is deemed useless.

"Of course it is clear that on the question of a carrier's liability the Federal Courts follow their own

jurisprudence. Authorities need not be cited on this point.

" The motion for a new trial must be refused."

As heretofore indicated, there is no pretense that there was any evidence adduced upon the trial raising the issue of negligence on the part of the railway company in connection with the fire which destroyed the cotton. The only question is validity and binding force of the exemption clause, and we respectfully submit that on reason and authority that clause in the bills of lading is binding and effectual and that the Court, therefore, properly instructed a verdict for the defendant.

We consider as sound the unanimous Opinion of the United States Circuit Court of Appeals affirming the judgment rendered by Judge Parlange, as follows (Record, p. 63) :

" By the Court : This was an action by the plaintiff in error to recover the value of certain cotton delivered to the defendant in error, to be transported from Texarkana, Texas, to the port of New Orleans, Louisiana, at an agreed charge for freight of sixty cents per hundred pounds. The petition alleged that, in evidence of the contract, the company delivered to the plaintiff in error, its certain bills of lading ; that while the bales of cotton were awaiting further shipment, but after they had been received by the railroad company as a common carrier and were in its possession as such, and after it had issued its bills of lading to carry the same, the whole of the cotton was destroyed by fire. The petition alleged further that by the third clause of the bills of lading the railway company attempted to limit its liability as a common carrier, declaring that it should not be liable for any damage to or destruction of the cotton caused by fire ; that this clause is wholly inoperative, null and void against the petitioner, on the following grounds : (1) that plaintiff did not receive any consideration from the railway company for

such limitation of its common-law liability ; (2) that the destruction of the cotton by fire was due to, and caused by the negligence of the company, its agents and servants ; (3) that the cotton was received by the railway company prior to the issuance of the bills of lading, and it was without authority after the receipt of the cotton as a carrier to limit its liability under the common law. The answer, besides the general issue, set up specially the terms of the third clause of the bills of lading, which so far as necessary to recite expressed 'that neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damage to or destruction of said cotton by fire.' The case came on for trial, and the evidence having been closed counsel for the defendant moved the Court to direct a verdict in favor of the defendant, which motion was granted, and the jury, under the direction of the judge returned their verdict, 'We the jury find a verdict in favor of the defendant;' upon which judgment was duly entered. In acting on the plaintiff's motion for a new trial the learned Judge of the Circuit Court said :

"The sole question in this cause is whether the clause in the bill of lading exempting the carrier from liability for loss by fire is binding on the plaintiff. No negligence is charged against the carrier. The shipment was made by the plaintiff's agent, an intelligent and experienced buyer and shipper of cotton. He is presumed to have known the law and to have been aware that the carrier, if he so desired, was compelled to take the freight under its common law liability, without the fire clause. Furthermore, it was proved that prior to the shipment plaintiff's agent called for blank bills of lading, took them to his office and in his own time filled them, and then presented them for signature by the carrier. This fact, together with the general knowledge which the plaintiff's agent must have had from his previous experience in shipping cotton, makes it certain that as matter of fact the plaintiff's agent knew of and assented to the fire clause. Shippers have been held bound by the fire clause in a bill of lading even when they claimed that they did not know that the clause was in the bill of lading, provided they were offered a full and fair opportunity to acquaint themselves with the contents of the bill of lading. Failure to read the bill of lading has been held under such circumstances, not to avail the shipper. But, of

course, the present clause is one in which as matter of fact the shipper knew or must be held to have known that the bill of lading contained the fire clause. I am clear that there is nothing in the evidence which would invalidate the bill of lading for duress, concealment, fraud or misrepresentation by the carrier."

"So far as it affects this case the statement of the law embraced in the foregoing extract from the trial judge's opinion is fully supported by the leading case of York Company v. Central Railroad, 70 U. S., 107, which has been cited with approval by the Supreme Court as late as the case of Queen of the Pacific, 180 U. S., 49.

"We have carefully examined the record submitted to us on this hearing, and concur in the view taken by the trial judge that there is nothing in the evidence which would invalidate the bills of lading for duress, concealment, fraud or misrepresentation by the carrier.

"The judgment of the Circuit Court is, therefore, affirmed" (pp. 63, 64).

VI.

It seems to be now intimated in the brief filed by plaintiff in this Court that the burden was on the defendant railway on the trial to establish by affirmative testimony the fact that the fire in the Union Compress was not the fault of the railway company.

This contention of the plaintiff is in direct contravention of the doctrine which has been laid down by the Supreme Court of the United States for many years; which is founded on elementary rules of law and justice; and which has been followed by our leading State Courts. That doctrine declares that when it is made to appear that the loss of the goods was caused

by one of the perils excepted against, the burden is then shifted on the plaintiff to show, if he can, that it was, nevertheless, caused by the neglect of the carrier.

Clark vs. Barnwell, 12 Howard, 272, 280.
R. R. vs. Reeves, 10 Wallace, 176, 190.
Trans. Co. vs. Downer, 11 Wallace, 129, 134.

We submit that the theories of the plaintiff, at pages 24 and 25 of his brief, as to the effect of the exception against loss by fire in this respect are mistaken. The plaintiff's agent was sojourning in Texarkana buying cotton. He knew the Union Compress, the course of business there, and the risks that attended the compressing of cotton. The cotton was burned there. If there was any neglect by the railway company it would have been easy for plaintiff, not only to make the vague allegation in his petition, but to prove neglect. The fact is that there was no neglect on the part of the railway company.

And we may here note, if need be, an apparent misapprehension on the part of plaintiff as to the jurisprudence of Louisiana in the matter of *this burden of proof*. The case of Berge vs. The Texas and Pacific Ry. Co., 37 An., 470, does not throw the onus on defendant here on the question of neglect. The Supreme Court of Louisiana, from early times, has held consistently the same doctrine laid down by the Supreme Court of the United States and has quoted the decisions of the latter Court in support of that view.

Price vs. Uriel, 10 An., 413.
Thomas vs. Morning Glory, 13 An., 269, 270.
New Orleans Ins. Co. vs. N. O. &c., R. R. Co., 20 An., 303.

We might note here also another misapprehension in the plaintiff's brief. *The railway company was not insured* on this cotton in any such general sense as seems to be implied by plaintiff. The insurance taken out by the compress company for the railway company only covered cotton for which the railway company should be legally liable for loss or damage by fire while contained on compress platforms and in cars on switches adjacent thereto, situate Texarkana, Texas (pp. 32, 48). The railway company cannot collect any insurance money under such circumstances unless it is held liable in this cause as carrier; and it has not been held liable, but, on the contrary, has been exonerated by two Courts. Nor does it hold any fund for plaintiff or owe him any duty in the matter of insurance. The question of insurance seems, therefore, to be irrelevant here.

It may also be pointed out that the plaintiff in his brief has made some errors in regard to the contents and effect of the testimony in the cause, and especially with respect to the witness, Pons. The testimony of Pons is not long, and the Court will examine it with its usual care. We submit that we have correctly stated the substance of it in the foregoing summary of the evidence. And on this point we may also refer to the opinion of the trial Judge *(ante,* p. 20) and of the Court of Appeals in their estimate of the facts *(ante,* p. 22).

In the light of the foregoing discussion and of the evidence given at the trial, it will be seen that each of the four special instructions asked by the plaintiff, was rightfully refused, either because *(a)* it had no foundation in the testimony or *(b)* was inapplicable to

the case, or *(c)* laid down an erroneous principle of law.

We submit that the judgment should be affirmed.

WILLIAM WIRT HOWE,
JOHN F. DILLON,
WALKER B. SPENCER,
Attorneys for Texas and Pacific Ry. Co.

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JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 57.

JOVITE CAU,

Plaintiff in Error,

vs.

THE TEXAS & PACIFIC RAILWAY COMPANY,

Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT IN ERROR IN REPLY.

WILLIAM WIRT HOWE,
WALKER B. SPENCER,
CHARLES P. COCKE,
Attorneys for Defendant in Error.

T. H. THOMASON PRINT, 323-325 NATCHEZ ST.

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BRIEF FOR DEFENDANT IN ERROR IN REPLY.

The brief of the plaintiff in error contains a variety of authorities whose application, and a number of suggestions whose pertinence to, the issues presented, we dispute; and we ask leave to file the following memorandum in reply.

I.

A number of cases are cited from the courts of Texas, Minnesota, Arkansas, Missouri and Tennessee in support of the proposition that the fire clauses in the bills of lading sued on are void for want of consideration. An examination of those cases will show that they fall into two distinct classes. The first class of cases does not deal with or at all decide the point raised. They decide that, under certain circumstances, it will be held that a fair opportunity to

choose between a contract for limited liability and the legal or unlimited liability of the carrier has not been afforded the shipper; that in the absence of such an opportunity being afforded, the contract will be regarded as extorted by duress; and that being so extorted, the exemptions from liability will not be enforced.

To this class belong the cases cited of:

Atchison Ry. Co. vs. Dill, 55 Am. and Eng. R. R. Cas. 376 (Kansas Sup. Ct.)

Louisville, etc., R. R. Co. vs. Sower, 49 Am. and Eng. R. R. Cas. 166 (Sup. Ct. of Tennessee).

Little Rock, etc., R. R. Co. vs. Craven, 55 Am. and Eng. R. R. Cas. 650 (Sup. Ct. of Arkansas).

St. Louis, etc., R. R. Co. vs. Spann, 20 S. W. Rep. 914 (57 Arkansas, 127).

Lewis vs. Great W. R. R. Co., 3 Q. B. Div. 195; 47 L. J. Q. B. Div. 131.

Carr vs. Lancashire, etc., R. R. Co., 21 L. J. Exch. 261; 7 Exch. 707.

We do not believe that any of the American cases were correctly decided on the facts presented; but in any event, *neither they nor the English cases have any application here for the reason that no unfairness in obtaining the contracts on the part of the carrier was averred or proved,* and the issue is, therefore, wholly extraneous to this case, and outside of the record.

The second class of cases do deal with the question of consideration and lend some color to the contention of the plaintiff in error.

We submit, however, that they are in essential conflict with the decisions of this Court; that they are unsound in principle; and more than that, that they are in the language of a dissenting judge in one of them "violative of elementary principles of law and morals." (Folkes, J. in

R. R. Co. vs. Gilbert, 42 Am. and Eng. R. R. Cas. 388). We think these points can be briefly demonstrated.

In the case of Wehrman cited (61 Am. and Eng. R. R. Cas. 273), the suit was for loss of goods shipped under a bill of lading exempting the carrier for loss after arrival of the goods at its warehouse. It appeared that the shipment was made at the regular published tariff rate. No evidence was introduced to show what would have been a reasonable charge or what was deemed a reasonable charge for carriage under the legal, instead of the contractual or limited liability. The Court held:

1. That the obligation to receive and transport was no consideration for the exemption, since the same obligation lay upon the carrier at common law.

2. That the Interstate Commerce Act forbade any abatement of, or from, the regular tariff rates; and that as the tariff in question made no mention of any limitation of liability, no abatement could be inferred and hence there was no consideration for the exemption, and it was void.

The first point ruled in this case is in direct conflict with the decision of this Court in the case of *York Company vs. Central Railroad Company, 3 Wallace, 113*, where it was held that "the consideration expressed was sufficient to support the entire contract;" such expressed consideration being the undertaking to carry.

The second point ruled proceeds upon an unwarranted assumption of an unproved fact, namely—that the regular tariff rate charged for the shipment was based upon the unlimited liability imposed by law; and the bill of lading containing the same rate, it was assumed that no concession in rate had been made. In making the assumption that the regular tariff was based upon the carrier's unlimited or legal liability, the Court not only ignored the com-

mon knowledge of the world that no man nowadays ships on the old common law liability of the carrier; and that all rates are made and based upon special contracts; but it ignored two elementary principles of law, namely, that

> "Every presumption is in favor of the legality of a transaction and it is for the party alleging its illegality to show everything necessary to render it so, though the proof be of a negative character." Merrill vs. Melchior, 1 George (Miss.), 516.
>
> See also Gelpke vs. City of Dubuque, 1 Wallace, 175.

This Court in the York case sanctions this rule by holding in effect that a consideration will be presumed.

This criticism of Wehrman's case applies in every particular to the cited cases of Kellerman, 34 S. W. Rep. 41 (Missouri, 1896), and Barnett, 34 S. W. Rep. 139 (Texas, 1896).

The case of Gilbert cited (42 Am. & Eng. R. R. Cases, 372), was one to recover the value of cotton shipped under a bill of lading containg a fire clause and destroyed by fire. This bill the plaintiff accepted and shipped under without the slightest objection, having accepted and used similar bills for a period of nine years. Three years after the loss he brought suit, alleging: (*a*) that he had not had "an opportunity of exercising the option" of accepting a limited or unlimited liability bill of lading; and (*b*) that he received no consideration for the limitation. It was shown, without dispute, that the agent receiving the cotton for shipment had no authority to give any rate, except that given to and accepted by the shipper, but that he could have secured immediate authority by telegraph to give a rate based upon the unlimited or legal liability of the carrier. The Court, nevertheless, held that the absence of such an authority was a want of that "readiness" to carry under its common

law liability which it is said the law demanded of the carrier; and held the bill extorted by duress, although there was no occasion for haste in the shipment, and though it did not appear that the time required for obtaining authority would have at all delayed the transportation of the cotton.

On the question of consideration, the Court found that *the rate charged in the bill of lading was the same as that charged before the insertion of the fire clause in such bill.* From this fact it concluded that no reduction was made on account of the introduction of the fire clause, and therefore held such clause to be without consideration and void. In respect of this case, we submit:

1. That it conflicts with the *York* case in this Court, since the expressed consideration was sufficient to support the entire contract.

2. That the case at bar is distinguished from it by the lack of any evidence to show that the rate prior to the insertion of the fire clause was the same as the bill of lading rate.

3. That the language of the dissenting Judge laid down a correct principle of law, which was applicable to the case and is applicable to, and should be enforced in this case, namely:

> "The shipper is charged with knowledge of the law that authorized him to demand a common law liability of the carrier, and his acceptance in silence of the bill of lading with the 'fire clause,' is a waiver of such demand or rate in the absence of fraud, where it appears there was a difference in the freight charges for a limited and unlimited liability. When, therefore, we have to deal with a litigation against loss by fire, without fault or negligence on the part of the carrier, there is no reason why the same general principle, appli-

cable to knowledge and estoppel between individuals other than carriers, should not be applied."

See Hutchison Carriers, Secs. 238, 240.

We submit, therefore, that the foregoing decisions are not in point; that they are in conflict with the decisions of this Court; and finally, that to permit a shipper to repudiate his own deliberate contract is to sanction "a most dangerous and perplexing innovation" (Folkes, J. dissenting in Gilbert's case, *supra*) in the law of carriers to say nothing of the law of morals.

II.

On pages 19, 20 and 21 of the opposing brief, the point is made that the bills of lading sued on do not constitute agreements at all, but are simple notices of a limitation of liability; and it is urged that the common law liability of the carrier cannot be gotten rid of by such notice or anything short of expressed contracts.

We presume this contention is based upon the fact that the bills of lading are not signed by the shipper. As to this it may be remarked that not one bill in a thousand ever is signed by the shipper, and that such signature has been held not necessary to establish his assent to the terms of the bill.

Piedmont Co. vs. Columbia R. R. Co., 16 Amer. & Eng. R. R. Cas., 194 (19 S. C. 353).

Adams Express Co. vs. Haynes, 42 Ill. 89.

Cincinnati R. R. Co. vs. Pontius, 19 Ohio St. 221.

Apart from this it appears that this shipper filled out these bills of lading himself, presented them for signature, and afterwards used them by attaching them to sight drafts. This conduct conclusively evidenced his assent to the terms of the bills and estopped him from claiming that he did not assent to such terms.

Furthermore, said bills contain the following provisions, namely:

> "That the acceptance of the bill of lading shall be deemed conclusive proof of the assent of the shipper to all the terms and conditions written or printed herein." (Tr. p. 23).

The plaintiff in error is still further concluded by his pleadings from urging the point made. After setting out the delivery and acceptance of cotton for carriage, he avers that:

> " * * * *In evidence of said contract* the said company then and there delivered its said bills of lading."

In the case of Washburn-Crosby Co. vs. Boston, etc. R. R. Co., 180 Mass. 252, goods shipped were lost by fire. The bill of lading contained a fire clause. This clause was attacked as invalid, as the plaintiff in error does here. The Court through his Honor, Mr. Justice Holmes, stated and disposed of the contention as follows:

> "With regard to the validity of the bills of lading, the fact is relied on that when the goods first were shipped, the sealer of the railroad receiving them gave a receipt simply acknowledging that the railroad had received the flour, and that the bills of lading were issued subsequently upon surrender of the receipt. It is argued that the provisions of the bills of lading are an attempt to cut down the liability already assumed, and by the law of Minnesota are without consideration and void. There are so many answers to this contention that it seems hardly worth while to state any. In the first place, the *plaintiff declares on the bill of lading, so that it is rather late now to say that it is void.*"

It is plain that a perfectly binding express contract was entered into and we submit that the shipper should not be permitted to question it after such conduct and such pleading.

III.

The plaintiff in error (brief, pages 22-23) cites six Louisiana cases to sustain the proposition that, where loss occurs by an excepted cause, the burden of proof is on the carrier to show no negligence. Five of these cases were decided by an inferior appellate court in the City of New Orleans known as the Court of Appeals for the Parish of Orleans. Its decisions customarily repose in the quiet dust of the Clerk's Office to which they are confided by the Legislature which makes no provision for their publication. They are not authority in Louisiana or elsewhere.

But one case is cited from the Supreme Court of Louisiana and this case does not sustain the contention advanced. On the contrary, the decisions of that tribunal cited in our original brief are fully in accord and explicitly follow the decisions of this Court in imposing the burden of proof on the shipper, when the loss is shown to have happened by a cause excepted against.

In any event the rule is a mere rule of evidence, and it is elementary that the Federal Courts will lay down and enforce their own rules in this branch of the law.

For the reasons given in our original brief and for those urged above, we again respectfully submit that the judgment brought here should ~~have been~~ be affirmed.

WILLIAM WIRT HOWE,
WALKER B. SPENCER,
CHARLES P. COCKE,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 57.—October Term, 1903.

Jovite Cau, Plaintiff in Error, vs. The Texas and Pacific Railway Company. } In error to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 16, 1904.]

This is an action to recover the value of cotton delivered by plaintiff to defendant, to be transported over its railroad from Texarkana, Texas, to New Orleans. The cotton was destroyed by fire while in the custody of defendant.

The action was originally brought in the Civil District Court of the Parish of Orleans and removed on the petition of defendant to the Circuit Court of the United States for the Eastern District of Louisiana. The case was tried to a jury, which, under the instructions of the court, rendered a verdict for defendant, upon which judgment was entered dismissing the suit with costs. (113 Fed. Rep. 91.)

The main question presented by the record is the effect of a provision in the bills of lading delivered by defendant to plaintiff, exempting it from liability for damages caused by fire. Incidentally a question arises as to the burden of proof. At the time of the delivery of the cotton there were four bills of lading issued by defendant—three exactly alike and the fourth substantially like the other three in all that is material to this case. They all contain the following provision: "That neither the Texas and Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damage to or destruction of said cotton by fire. . . ."

For the purpose of showing the delivery of the cotton to the defendant the plaintiff introduced in evidence the bills of lading, but without prejudice to his claim that the provision quoted was not binding in the absence of a consideration therefor. The court admitted the bills of lading, with that limitation.

The other evidence in the case was that the bills of lading in blank were obtained from the defendant's agent by plaintiff's agent, and three of them made out by the latter at his office. The record leaves doubtful whether the other bill of lading was prepared by him or by the agent of defendant. The former, however, testified that he did not know the fire clause was in the bills of lading, and further testified as follows:

"A. When I applied to the agent of the Texas and Pacific railroad for a rate to New Orleans on the cotton I was going to ship he told me I could get but one rate, 60 cents per 100 pounds; that that was the rate

of the other roads. And I gave them the cotton because it was the most direct line to New Orleans. I simply went there to get the rate, and I simply gave them the cotton at that rate which they gave me, 60 cents per 100 pounds."

He also testified that he did not want to know the lowest rate; that he asked for the correct rate, he knew there was but one rate, all of the roads having the same, and that it was against the law to give other rates.

The following was the testimony as to the fire clause:

"Q. What I mean to say is this: Did you tell the agent of whom you asked for the rate that you did not want any fire clause in any bill of lading which he might issue to you?—A. No, sir.

"Q. Did you tell him that you wanted to ship your cotton without any fire clause in the bill of lading?—A. No, sir; because I did not know it was in the bill of lading.

"Q. Therefore you made no application to him then for a rate based on a bill of lading not containing the fire clause?—A. I made no application that way; I made no inquiries; I just asked for the rate.

* * * * * *

"Q. Allowing that his reply to you was only one rate, was anything said by him as to the different kinds of contracts you could get?—A. No, sir; he never said anything to me at all.

"Q. Were you or not informed that you could get a contract under which the company would be liable as insurer, practically, and another kind of contract, under which they would not be liable for loss in case of fire?—A. No, sir.

"Q. Did you have any information, or did you know that if you wanted to make a choice between these two that you could do it?—A. No, sir."

The cotton was in the possession of the Union Compress Company when destroyed to which company it had been delivered by defendant to be compressed, and that company had obtained insurance on it for the defendant, it being the custom of that company to effect insurance for the benefit and in the name of each particular railroad compressing cotton at their press. The testimony of the destruction of the cotton is that the Union Compress Company's building and platforms in Texarkana, Texas, were destroyed by fire September 19, 1900, in which the cotton was destroyed with other cotton.

Plaintiff requested instructions of the court which embodied the following propositions:

1. A carrier cannot limit his common law liability without consent of the shipper for consideration given.

2. The mere contract of shipment is not such a consideration.

3. The condition usually, though not necessarily, is a reduced rate, but in such case both rates must be offered shipper and be reasonable, and the shipper given a genuine freedom of choice in making his selection, and if the evidence satisfied the jury, "there was no fair alternative or choice offered to plaintiff by defendant as between two rates, under one of which

defendant would be liable for the loss of said cotton by fire, and under the other of which he would not be so liable," the fire clause was not binding upon plaintiff, and the jury might "deal with such bill of lading as though it did not contain such clause or stipulation."

4. The burden of proving the reasonableness of the fire clause, and that plaintiff had a fair opportunity to refuse or accept it, rested upon the defendant.

Mr. Justice McKenna, after stating the case, delivered the opinion of the Court.

It is well settled that the carrier may limit his common law liability. (*York Co.* v. *Central Railroad*, 3 Wall. 107.) But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an "option and opportunity must be given to the shipper to select under which, the common law or limited liability, he will ship his goods."

If this means that a carrier must take no advantage of the shipper or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the "option and opportunity" which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper, (*New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344,) and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. (*Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Bank of Kentucky* v. *Adams*, 93 U. S. 174.)

Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed.

(2) It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in *York Co.* v. *Central Railroad*, *supra*. In response it was said: "The second position is answered by the fact, that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made."

In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate. It was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common law liability of the roads.

(3) The carrier cannot contract against the effect of his negligence, and hence it is contended that in the case at bar the burden of proof is upon the defendant to show that the fire was not caused by its negligence or that of its servants. The contention is answered by *Clark et al.* v. *Barnwell et al.*, (12 How. 272.) In that case the bill of lading bound the carrier to deliver the goods in like good order in which they were received, dangers and accidents of the seas and navigation excepted. It was held that after the damage to the goods had been established the burden lay upon the carrier to show that it was caused by one of the perils from which the bill of lading exempted the carrier. But it was also held that even if the damage so occurred, yet if it might have been avoided by skill and diligence at the time the carrier was liable. "But," it was observed, "in this stage and posture of the case the burden is upon the plaintiff to establish the negligence as the burden is upon him." The doctrine was affirmed in *Transportation Co.* v. *Downer*, (11 Wall. 129.) See also section 218, 2 Greenleaf on Evidence.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.